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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The question presented in this petition arises from the continuing, long-running litigation over the remedial phase of the Kansas City, Missouri intradistrict school desegregation case, in which comprehensive and unprecedented educational, financial and physical resources have been provided, thus far at a cost in excess of $1.3 billion, to a school district of approximately 37,000 students.

The question presented is:

Whether, in a school desegregation case, a federal court may order a perpetual remedy by imposing a requirement, as a prerequisite to a declaration of unitary status, that extraordinary funding of the quality education components of the remedy be made permanently available?

PARTIES TO THE PROCEEDING

A complete list of the parties to the proceeding is contained in the caption to the May 3, 1994 opinion of the Court of Appeals. Petition Appendix (hereinafter "Pet. App.") A-1 through A-13. The petitioners are the State of Missouri and its listed officials.

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No.

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STATE OF MISSOURI, et al.,
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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

OPINIONS BELOW

The May 3, 1994, opinion of the Court of Appeals is reported at 23 F.3d 1297 and is reprinted at pages 1 to 13 of the accompanying appendix to this petition. The opinions of the District Court (pages 14-30 of the appendix) are unreported.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals was entered on May 3, 1994. An application for extension of time to and including August 31, 1994 in which to file the present petition for writ of certiorari was granted on July 25, 1994. The jurisdiction of this Court rests on 28 U.S.C. section 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

U.S. Const. Amend. XIV, section 1: "No state shall...deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This matter arises out of the Kansas City desegregation lawsuit. To date, the remedies imposed in this seventeen year old case have cost the taxpayers of Kansas City and Missouri over $1.3 billion. The Eighth Circuit, in an extraordinary decision that is the subject of this petition, held that the quality education components of this remedy, which alone have consumed over $220 million, must be "permanently available." Pet. App. 9. This ruling, purporting to subject the citizens of the State of Missouri to perpetual liability, is closely related to a decision that is the subject of the petition pending with the Court in No. 93-1823 (filed March 16, 1994). There, the same dedicated Eighth Circuit panel erroneously held that the Kansas City, Missouri, School District (KCMSD) is not eligible for a declaration of partial unitary status until it can be shown that the quality education component of the remedy has had the actual result of elevating students' scores on standardized tests. *See Jenkins v. Missouri,* 11 F.3d 755, 766 (8th Cir. 1993).

Alone and in combination, these grossly errant rulings demonstrate that the Court of Appeals seriously misapprehends this Court's established mandate that "never-ending" remedies are not authorized by the Fourteenth Amendment, *Freeman v. Pitts*, ___U.S.___, 112 S. Ct. 1430, 1448 (1992), and that any desegregation remedies are "intended as . . . temporary measure[s]," *Board of*

Education v. Dowell, 498 U.S. 237, 248 (1991). If left to stand, they would subject the citizens of the State of Missouri, who have already expended some $2.9 billion on the St. Louis and Kansas City desegregation remedies, to a perpetual remedy of unprecedented and massive financial proportions. Therefore, the Court should grant this petition for writ of certiorari and review and correct the Court of Appeals' erroneous ruling that desegregation remedies may be never-ending.

THE PRIOR PROCEEDINGS

The initial complaint in this litigation was filed by the Kansas City, Missouri School District and certain of its Board members, alleging that the State of Missouri, its Board of Education and various state officials, and twelve Missouri suburban school districts in the Kansas City area had caused unconstitutional intradistrict segregation throughout the Kansas City metropolitan area. The complaint sought a sweeping remedy involving reassignment of students across district and state lines. The District Court realigned the KCMSD as a defendant in October 1978. *School District of Kansas City, Missouri v. State of Missouri*, 460 F. Supp. 421, 442 (W.D. Mo. 1978). Thereafter, in May 1979, students in the KCMSD and in several Missouri school districts filed an amended complaint, naming, *inter alia*, the Missouri defendants named in the original complaint. This amended complaint included a claim of an intradistrict constitutional violation within the KCMSD.[1]

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[1]The jurisdiction of the District Court was based on 28 U.S.C. sections 1331 and 1343 (a)(3).

The District Court rejected the claims for interdistrict relief, *Jenkins v. Missouri*, Order of June 5, 1984, *aff'd*, *Jenkins v. Missouri*, 807 F.2d 657, 671 (8th Cir. 1986), *cert. denied*, 484 U.S. 816 (1987), but held the KCMSD and State defendants liable on the intradistrict claims.

While the appeals of the District Court's order finding no interdistrict liability were pending, the Plaintiffs and KCMSD sought an extensive intradistrict remedy. The District Court issued its initial intradistrict remedial order on June 14, 1985. *Jenkins v. Missouri*, 639 F. Supp. 19 (W.D. Mo. 1985).

Part of the comprehensive remedial program ordered at that time was an extensive set of quality education programs, whose implementation began in the 1985-86 school year. To date those programs alone have cost the taxpayers of KCMSD and Missouri more than $220 million. The District Court ordered expansive new programs to make additional educational opportunities available to all KCMSD students, including: a program providing resources designed to restore the KCMSD to the top classification awarded by the State Board of Education, "AAA," based on standards for numbers of librarians, specialty teachers and library resources. The Court ordered as a desegregation expense the hiring of additional librarians, art, music and physical education teachers, teacher aides, and counselors, and the acquisition of additional media and library resources. The District Court also ordered program funding for additional teachers to achieve a reduction in class sizes, lowering pupil-teacher ratios in the District to levels even more favorable to the KCMSD than that required for a AAA rating. *Id.* at 28-30. The District Court order thus required the hiring of 183 additional teachers and funding of their salaries as a desegregation expense. The cost of

these programs, borne over nine years so far, is more than $115 million.

In addition to these already massive elements, the District Court ordered implementation of an extensive array of educational programs designed to expand the available learning opportunities for all KCMSD students. These included a summer school program for all grades, a full-day kindergarten program replacing the District's half-day kindergarten program, a before and after school tutoring program, and an early childhood education program for pre-schoolers. *Id.* at 30-33. More than $55 million has been spent on these programs to date. Finally, the Court ordered an "effective schools" program which was expressly intended to improve student test scores. This program consisted of cash grants to each district school, with higher funding to those schools whose minority enrollment was greater than 90%, for use to create and run programs to achieve improved test scores.[2] In subsequent orders, the District Court approved some minor variations among the programs, although generally this set of quality education programs has remained in effect since the 1985-86 school year. More than $51 million was spent on this program through the 1993-94 school year. In a typical year, such programs now cost taxpayers approximately $54 million when other programs such as Maintenance, Security, Desegregation Monitoring Committee expenses, District Communications, Base Budgets and 1986-87 Magnet theme

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[2]The original Milliken II program also included funding for base budgets for certain schools, a program to fund publicity about the desegregation program and funding for a set of magnets. That magnet school budget has now been transferred to the magnet plan component of this comprehensive remedy.

costs are included. *Jenkins v. Missouri, slip op.*, Order of June 17, 1992, p. 7.

As extraordinary as they are, these *Milliken II* programs are but one part of a comprehensive and "extraordinary remedy" ordered by the District Court and affirmed by the Court of Appeals in previous litigation. *Missouri v. Jenkins*, 495 U.S. 33, 77, 80 (1990) (Kennedy, J., concurring); *Jenkins v. Missouri*, 855 F.2d 1295 (8th Cir. 1988).[3] At the joint request of the KCMSD and Plaintiffs, the District Court has also ordered a comprehensive magnet plan for all of the high and middle schools, as well as most of the elementary schools in the District. These magnet programs have cost an additional $300 million to date. Moreover, the District Court has approved a massive capital improvements program for which expenditures have so far totalled approximately $417 million, with more than $500 million ordered, and additional requests forthcoming. The District Court also approved salary increases as a desegregation expense for virtually all KCMSD personnel, instructional and non-instructional. The total cost of all of these remedies to date is more than $1.3 billion.[4]

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[3] This case has been before this Court on two previous occasions. *Missouri v. Jenkins*, 495 U.S. 33 (1990) (court-imposed tax increases); *Missouri v. Jenkins*, 491 U.S. 274 (1989) (attorneys' fees).

[4] In 1990, four members of this Court expressed serious reservations over the cost and scope of the remedy, which due to their massive costs, had resulted in a court-authorized tax increase above that approved by the KCMSD voters. *Missouri v. Jenkins*, 495 U.S. at 76-80 (Kennedy, J., concurring). This Court, by a 5 to 4 vote, affirmed a procedure by which the KCMSD could increase taxes above the level approved by the voters under State law to enable KCMSD to contribute further towards its share of the cost of

As discussed in its Petition for Writ of Certiorari No. 93-1823, following this Court's 1992 decision in *Freeman v. Pitts*, ___ U.S. ___, 112 S. Ct. 1430 (1992), in response to the District-respondents' motion for approval of the eighth annual education program budget, the State asked the District Court to declare partial unitary status with regard to the *Milliken II* quality education components of the remedy, based on the State's showing, uncontroverted at trial, that the quality education programs in KCMSD exceeded the District Court's questionable "suburban comparability" standard.[5] The District Court approved a $54.5 million budget for the quality education component, but was completely silent with respect to the Petitioners' request for a declaration of partial unitary status, providing no findings of fact or conclusions of law. Order of June 17, 1992, *slip op.* at 7. On appeal, the Eighth Circuit affirmed the District Court's approval of the budget items, but went dramatically further, expressly adding a new unitary status standard requiring movants to demonstrate improved academic achievement (as shown by results on standardized tests) before a declaration of unitary status

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the unprecedented remedy approved for the District. The Chief Justice and three Justices concurring would have examined the extraordinary scope of the remedy to determine whether less intrusive financing means would have been sufficient. *Id.* at 78-80.

[5] The first time the State presented trial evidence on this issue it was able to demonstrate without dispute that the *Milliken II* facilities and programs in KCMSD have been fully and properly implemented since at least 1988 and that the KCMSD "'exceeds what's available in all the suburban school districts in almost every area of classification'" examined by the Missouri Department of Elementary and Secondary Education. *See Jenkins v. Missouri*, 19 F.3d 393, 401 (8th Cir. 1994) (Beam, J., dissenting from denial of reh'g en banc).

could be obtained. *Jenkins v. Missouri*, 11 F.3d 755, 765-66 (8th Cir. 1993). The State sought rehearing by the panel and suggested rehearing en banc, which was denied by a 6 to 5 vote. The five judges dissenting from the denial of rehearing en banc agreed that the panel's decision imposing a student achievement standard was erroneous. *See generally Jenkins v. Missouri*, 19 F.3d 393, 396-404 (8th Cir. 1994) (Beam, J., dissenting from denial of rehearing en banc).

In 1993, with the prior year's decision still in the appeal process, the State preserved its position on this issue and again sought partial unitary status in the District Court with regard to the *Milliken II* quality education programs. The District Court again denied the State's request, and the State appealed to the Eighth Circuit. In affirming the District Court, the Eighth Circuit, on May 3, 1994, referred to its earlier opinion, *Jenkins*, 11 F.3d 755 (which is the subject of the petition pending in No. 93-1823), but took yet another astonishing step away from this Court's unitary status decisions, holding that the State's extraordinary funding for the quality education components of the remedy must be made "permanently available" to the KCMSD. Pet. App. 9.

In coming to this erroneous conclusion, the panel made clear that it had rejected the argument that State funding for these programs should ever end, even if they were otherwise amenable to a declaration of partial unitary status:

> The State's position has simply been that its obligation for these programs is concluded and, in the colorful wording of the dissent, that it should "now take its money and exit, stage left." *Id.* [citing *Jenkins*, 19 F.3d at 404 (Beam, J., dissenting from

> denial of rehearing en banc)]. This is precisely the meaning of the State's argument that its responsibility and obligation should be terminated. This has been rejected by the judges voting to deny rehearing en banc, and most tellingly by the five judges joining in the dissent to denial of rehearing.

Pet. App. 8. The panel made it clear that its primary concern was that the elimination of State funding for these programs would result in "increased financial burden on KCMSD," Pet. App. 9, even if the funding were gradually phased out in an orderly fashion allowing for local planning. In the panel's view (presently binding on the Petitioners and the School District respondents), these particular programs embody "equal opportunity" and therefore shall not be terminated. Pet. App. 8-9. The panel confuses the obligation to eliminate the vestiges of discrimination to the extent practicable with the purported obligation to provide particular programs in perpetuity.

The Court of Appeals made absolutely no effort to square its conclusion that the quality education programs must be permanently available to KCMSD students with this Court's holdings in *Freeman* and *Board of Education v. Dowell*, 498 U.S. 237 (1991). Moreover, it cited no authority for its ruling that the quality education programs must permanently continue after unitary status is achieved. The simple fact is that the decision is wholly contrary to this Court's decisions emphasizing that the judiciary is not to become a permanent board of education and that desegregation remedies are temporary measures.

REASONS FOR GRANTING THE WRIT

1. The Court of Appeals' Opinion Conflicts With Decisions of This Court Holding That Desegregation Remedies Are Not Permanent Educational Funding Mechanisms.

The Court of Appeals' Opinion Directly Conflicts With this Court's Opinions in *Board of Education v. Dowell* and *Freeman v. Pitts*, Which Held That Desegregation Remedies Were Intended to be Temporary and Were Required to End Once They Have Brought the District to Unitary Status.

The decision of the panel, requiring the citizens of the State to provide extraordinary funding on a permanent basis for the quality education programs included in the KCMSD desegregation remedy, creates a perpetual remedy. This is wholly contrary to this Court's repeated pronouncements that desegregation remedies are temporary vehicles to eliminate the vestiges of past *de jure* desegregation to the extent practicable. The Eighth Circuit's ruling effectively eviscerates the entire concept of unitary status, the very essence of which is the cessation of the remedy and the withdrawal of federal court supervision. The governing decisions of this Court do not countenance such a "never-ending" deviation from the "vital national tradition" of local autonomy over schools.

In *Board of Education v. Dowell*, 498 U.S. 237 (1991), this Court held that "[f]rom the very first, federal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Id.* at 247. The Court reemphasized this principle noting that

"[s]uch [remedial] decrees . . . are not intended to operate in perpetuity." *Id.* at 248.[6] *Dowell* involved this Court's reversal of a Tenth Circuit decision holding that a desegregation decree remains in effect until a school district can show "grievous wrong evoked by new and unforeseen conditions". *Dowell v. Board of Education*, 890 F.2d 1483, 1490 (1989) (*citing United States v. Swift & Company*, 286 U.S. 106, 119 (1932)). Rejecting that proposition, this Court found:

> The test espoused by the Court of Appeals would condemn a school district, once governed by a board which intentionally discriminated, to judicial tutelage for the indefinite future. Neither the principles governing the entry and dissolution of injunctive decrees, nor the commands of the Equal Protection Clause of the Fourteenth Amendment, require any such Draconian result.

Dowell, 498 U.S. at 249. Instead, this Court held:

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination. *See Milliken v. Bradley [Milliken II]*, 433 U.S. at 280-

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[6] Even the dissenters in *Dowell* agreed in principle with this point: "The majority is correct that the Court has never contemplated perpetual judicial oversight of former de jure segregated school districts." *Dowell*, 498 U.S. at 266 (Marshall, J., dissenting).

> 82, 97 S. Ct. at 2757-58." *Spangler v. Pasadena City Bd. of Education*, 611 F.2d, at 1245 n.5 (Kennedy, J., concurring).

Id. at 248. The Court in *Dowell* thus made it clear that desegregation remedies are temporary solutions to specific problems, not vehicles for permanent program funding. That decision plainly stands for the proposition that such remedies are not intended to dictate the programs, curriculum and extracurricular activities of a district forever.

In the term following the *Dowell* decision, this Court reaffirmed and expanded upon this precise holding. In *Freeman v. Pitts*, 112 S. Ct. 1435 (1992), relying on the principle established in *Milliken II*, the Court stated:

> We have said that the Court's end purpose must be to remedy the violation and in addition to restore state and local authorities to the control of a school system that is operating in compliance with the Constitution.

Freeman, 112 S. Ct. at 1445 (citing *Milliken II*, 433 U.S. at 280-81). The Court in *Freeman* further affirmed its agreement with the fundamental principle that returning school districts entirely to the control of local authorities was the ultimate objective of a school desegregation case:

> In *Dowell*, we emphasized that federal judicial supervision of local school systems was intended as a "temporary measure." 498 U.S., at 247, 111 S. Ct., at 636. Although this temporary measure has lasted decades, the ultimate objective has not changed -- to return school districts to the control of local authorities.

Freeman, 112 S. Ct. at 1445. The Court reiterated the importance and foundation of this objective, stating:

> Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.

Freeman, 112 S. Ct. at 1445.[7]

In sharp contrast to these binding and unambiguous principles, the Eighth Circuit held below that quality education programs funded and implemented as part of a desegregation remedy, must be "permanently available to each student in the KCMSD." Pet. App. 9. Even more egregious, the panel implicitly held that this permanent remedy must be provided even if the KCMSD is otherwise eligible for a declaration of unitary status, either partial or full. Pet. App. 9. The Eighth Circuit made it clear that it would not release the State from its massive and extraordinary funding obligation in the KCMSD despite the fact that since 1988 it had provided quality education programs at a level unsurpassed in Missouri. Pet. App. 6-9. This ruling has the precise effect of condemning the State

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[7] Whether the Eighth Circuit ruling at issue is read as a requirement for continued programs after unitary status, or as a requirement that a mechanism for funding these programs be permanently in place as a condition precedent to unitary status, the results should be no different. Requiring establishment of a perpetual funding mechanism for the components of a desegregation remedy as a condition to even reach unitary status is a transparent method of requiring such remedies to continue after unitary status is obtained. In short, this Court has never required that any desegregation remedy be permanently funded. To the contrary, *Dowell* and *Freeman* plainly stand for the proposition that permanent remedies -- funded or otherwise -- are inappropriate in desegregation cases.

and, in this case, the school district, "to judicial tutelage for the indefinite future" because it had once been guilty of discrimination in the provision of education. *Dowell*, 498 U.S. at 249. This result is plainly precluded by *Dowell* and *Freeman* and perverts this Court's observation that "'local autonomy of school districts is a vital national tradition'". *Freeman*, 112 S. Ct. at 1445 (quoting *Dayton Board of Education v. Brinkman*, 433 U.S. 406, 410 (1977)).

This principle is firmly rooted in the constitutional jurisprudence of this Court. *Freeman* and *Dowell* themselves relied on *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1 (1971), and *Pasadena Board of Education v. Spangler*, 427 U.S. 424 (1976), where the Court rejected twice the notion that there were perpetual aspects to desegregation remedies. In *Swann*, this Court held that the Constitution did not require "school authorities [or] district courts . . . to make year-by-year adjustments of the racial composition of student bodies once the affirmative duty to desegregate has been accomplished and racial discrimination through official action is eliminated from the system." *Swann*, 402 U.S. at 31-32. Likewise, *Spangler* stands for the proposition that perpetual judicial supervision and modification of school attendance zones was not constitutionally required where the district had implemented a desegregation program to obtain racial neutrality in student attendance:

> In this case, the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's public schools. No one disputes that the initial implementation of this plan accomplished *that* objective. That being the case, the District Court was not entitled to require the [school district] to rearrange its attendance zones

> each year so as to ensure that the racial mix desired by the court was maintained in perpetuity. For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns.

Spangler, 427 U.S. at 436-37.

Swann and *Spangler*, like *Dowell* and *Freeman*, stand squarely for the principle that permanent desegregation remedies, such as that which would necessarily result from the Court of Appeals' ruling, are neither constitutionally required nor consistent with the "ultimate objective" of returning school districts to the control of local authorities as soon as possible. This Court's precedents do not even hint at a rationale for a decision that would make the *Milliken II* components of the KCMSD remedy permanent fixtures. Because of the enormous expense associated with these programs (and the others that KCMSD and plaintiffs have argued are "inextricably intertwined" with these programs), the potential effect on other remedy-phase cases and because such a permanent remedy defies the express rulings by this Court on the subject, this Court should grant the petition and review the Eighth Circuit's erroneous holding.[8]

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[8]Perhaps it is understandable that the District Court and the dedicated Eighth Circuit panel are genuinely frustrated by their inability to achieve hoped-for educational outcomes through imposition of these extraordinary, billion dollar remedies. Their frustration may lie, however, in their misperception of the purpose of desegregation remedies in the first place. Those remedies, as this

2. The Court of Appeals' Decision Requiring Imposition of a Component of a Desegregation Remedy on a "Permanent" Basis Creates a Conflict Among the Circuits.

Prior to this Court's decision in *Dowell*, every circuit that had considered the issue (other than the Tenth Circuit, which this Court reversed in *Dowell*), had held that the consequence of a declaration of unitary status was the relinquishment of jurisdiction by the courts and the return of autonomy and responsibility for the school district to the local authorities. These courts rejected the theory that any program ordered as a component of a court-supervised desegregation remedy must be permanent. The Eighth Circuit's decision here flatly conflicts with those rulings.

For example, in *Morgan v. Nucci*, 831 F.2d 313 (1st Cir. 1987), the First Circuit stated

> the one thing certain about unitariness is its consequences: the mandatory devolution of power to local authorities. Thus, when a court finds that discrimination has been eliminated "root and branch" from school operations, it must abdicate its supervisory role, in recognition that the "local autonomy of school districts is a vital national tradition."

Court has repeatedly instructed, are to be temporary measures to provide equal education opportunities, not permanent measures to insure equal outcomes. When equal opportunities are provided, the raison d'etre for desegregation remedies is over, and federal court supervision must cease.

Id. at 318 (quoting *Dayton*, 433 U.S. at 410) (emphasis supplied). Similarly, in *Riddick v. School Board of Norfolk*, 784 F.2d 521 (4th Cir. 1986), *cert. denied*, 479 U.S. 938 (1986), the Fourth Circuit held that "once the goal of a unitary school system is achieved, the district court's role ends." *Id.* at 535. In *Vaughns v. Board of Education of Prince George's County*, 758 F.2d 983, 988 (4th Cir. 1985), the Fourth Circuit stated:

> A district court's jurisdiction to grant further relief in school desegregation cases is not perpetual, however. Once a school system has achieved unitary status, a court may not order further relief to counteract resegregation that does not result from the school system's intentionally discriminatory acts.

The Ninth Circuit has also ruled that "[t]he displacement of local government by a federal court is presumed to be temporary" and should not "continue in perpetuity". *Spangler v. Pasadena City Board of Education*, 611 F.2d 1239, 1241 (9th Cir. 1979). In his concurring opinion, then Circuit Judge Kennedy stated:

> When a court-ordered remedy has accomplished its purpose, jurisdiction should terminate. The relinquishment of jurisdiction in a proper case serves to restore to the state and local agencies the legal responsibility for supervising a school system that is properly theirs, and this too is a necessary consideration in fixing the duration of the court's remedial supervision.

Id. at 1242 (Kennedy, J., concurring).[9] The Fifth Circuit has similarly agreed that a declaration of unitary status ends a court's supervisory jurisdiction over desegregation defendants:

> Attaining unitary status . . . means that a school board is free to act without federal supervision so long as the board does not purposefully discriminate . . .

United States v. Overton, 834 F.2d 1171, 1175 (5th Cir. 1987).

The Eighth Circuit's opinion in the instant case is also in conflict with appellate court decisions subsequent to this Court's holding in *Dowell*. For example, upon remand in *Dowell*, the Tenth Circuit recognized that education was not a fundamental right and a return to local control at the first possible moment was the paramount goal:

> [C]onsistent with the Supreme Court's view that education is not a fundamental right protected by the federal Constitution, see *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 17-44, 93 S. Ct. 1278, 1288-1302, 36 L. Ed. 2d 16 (1973), it is imperative that federal control of the schools should be relinquished to local authorities as soon as possible. "[F]ederal supervision of local school systems was intended as a temporary measure to remedy past discrimination." *Dowell*,

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[9] This Court noted in *Dowell* that the School Board's petition for certiorari there was granted to resolve a conflict between the Tenth Circuit standard and that laid down by the Fourth and Ninth Circuits in *Riddick* and *Spangler*. *Dowell*, 498 U.S. at 244.

> 498 U.S. at 247, 111 S. Ct. at 636 . . . . "Returning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system".

Dowell v. Board of Education, 8 F.3d 1501, 1511 (10th Cir. 1993) (quoting *Freeman*, 112 S. Ct. at 1445). The Fifth Circuit has also recognized that *Freeman* and *Dowell* "created a framework in which equitable decrees will not remain in effect perpetually and school districts can be returned to local control." *Hull v. Quitman County Board of Education*, 1 F.3d 1450, 1454 (5th Cir. 1993).

In two cases decided eleven days apart, the Eleventh Circuit also recognized that desegregation decrees do not have permanent characteristics. In *Lee v. Etowah County Board of Education*, 963 F.2d 1416, 1421 (11th Cir. 1992), the Court affirmed that "federal judicial control over a school system cannot extend beyond the achievement of unitary status." *Id.* (citing *Dowell*, 498 U.S. at 248, 111 S. Ct. at 637). In *Lee v. Talladega County Board of Education*, 963 F.2d 1426, 1429 (11th Cir. 1992), the Eleventh Circuit recognized that "the limited nature of a federal court's remedial powers as well as the fundamental limitations of federalism render continuing federal judicial supervision of local school authorities incompatible with a finding of unitary status". *Id.* (citing *Dowell*, 498 U.S. at 248, 111 S. Ct. at 637). The Court relied on *Dowell* in holding that "[i]njunctive decrees in school desegregation cases were never intended to operate in perpetuity" and that "federal supervision of a local school authority that has operated a racially dual system is a temporary measure that should last only as long as necessary to remedy past racial discrimination". *Talladega County*, 963 F.2d at 1429. The Eleventh Circuit further recognized that "no one's interest

is furthered by subjecting the nation's educational system to 'judicial tutelage for the indefinite future'". *Id.* at 1430 (quoting *Dowell*, 498 U.S. at 249, 111 S. Ct. at 638).

The Eighth Circuit's holding that extraordinary quality education programs -- implemented as part of a comprehensive desegregation remedy -- must be a permanent fixture is squarely in conflict with these other court of appeal rulings. Nothing in the decisions of the other courts of appeals that have considered this issue supports a permanent right to court-ordered pupil-to-teacher ratios, early childhood or full-day kindergarten programs, or a specific program intended to make schools more effective by increasing test scores as a permanent aspect of a school district. The Eighth Circuit's attempt to make the KCMSD remedy permanent squarely conflicts with the notion of relinquishment of federal court supervision, a principle reaffirmed again and again by the other circuits. Moreover, by imposing a permanent remedy, the Court of Appeals' decision renders the principle of relinquishment meaningless. Therefore, this Court should grant the petition for writ of certiorari to review this conflict among the courts of appeals.

3. The Court of Appeals' Opinion Elevates Quality Education to the Level of a Constitutionally Protected Right, Contrary to Past Decisions of This Court.

It has long been clear that the Fourteenth Amendment does not establish a right even to an education, much less to any particular level of quality of education. *See Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 458 (1988); *Papasan v. Allain*, 478 U.S. 265, 284 (1986); *Plyler v. Doe*, 457 U.S. 202, 223 (1982); *San Antonio School*

District v. Rodriguez, 411 U.S. 1, 35 (1973).[10] But in permanently requiring a particular level of quality of education in the KCMSD through the perpetual maintenance of a particular set of educational programs, the Court of Appeals purports to establish a new constitutional right. This result flatly contradicts this Court's clear holdings on this issue.

The Constitution simply does not contain any guarantee of an education, or an education of any particular quality, much less a guarantee of some permanent level of quality, as this Court has made clear. In *Rodriguez* the Court plainly distinguished between the protection of rights that rise to a constitutional level and supposed guarantees of those same rights to particular levels of quality:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice.

Id. at 36 (emphasis in original). Thus, for example, while each citizen's right to speak is protected, that citizen is not guaranteed any level of eloquence or persuasiveness. Similarly, the Constitution here guarantees only that, to the extent local governmental authorities decide to provide

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[10] *See also Dowell v. Board of Education*, 8 F.3d 1501, 1511 (10th Cir. 1993) (". . . consistent with the Supreme Court's view that education is not a fundamental right protected by the federal Constitution . . . is the imperative that federal control of schools should be relinquished to local authorities as soon as possible").

education to the public, it must be equally available to all eligible citizens without regard to race.

The constitutional right at issue in this desegregation case is equal access to whatever quality of education is offered in the particular school district as a matter of local preference. As one district court has correctly noted:

> The fourteenth amendment requires an equal education. There is no constitutional guarantee of a quality education. The Constitution is satisfied if all of the students . . . [in a school district] receive an equally bad education, regardless of race.

Coalition to Save Our Children v. Board of Education, 757 F. Supp. 328, 350 (D. Del. 1991). Indeed, even the Eighth Circuit has itself opined in the past that no particular level of educational quality is guaranteed by the Fourteenth Amendment:

> Although efforts to improve the quality of education for all students is [sic] desirable, this emphasis fundamentally misapprehends the constitutional requirement of achieving a unitary school system. The achievement of quality education is not premised on the equal protection clause of the Fourteenth Amendment. . . . Federal courts lack jurisdiction under the Fourteenth Amendment to require quality education in state school districts other than to erase the effects of prior school segregation. The sole goal of *Brown* is to erase the dual educational system and achieve unitary schools. . . . Segregated school systems have undoubtedly resulted in a loss of *equal opportunity* for quality education for all students. However, it is the "equal

> opportunity," not the quality education which is germane to the constitutional concern.

Liddell v. Caldwell, 546 F.2d 768, 773 n.10 (8th Cir. 1976) (emphasis in original).

The Eighth Circuit correctly stated the law with regard to educational quality in 1976. The quality education component was put in place only to "erase the effects of prior school segregation." This Court's precedents make it clear that there is no "right" to an education that rises to constitutional levels, no "right" to a particular level of educational quality, and certainly no constitutional right to have extraordinary education programs available on a permanent basis.

CONCLUSION

The Eighth Circuit's ruling requiring permanent funding of the quality education components of the KCMSD desegregation remedy is in square conflict with the decisions of this Court in *Dowell* and *Freeman*. The decision also conflicts with rulings of the other Courts of Appeals. In application, the Eighth Circuit's holding would require judicial supervision forever to assure that the level of quality selected as guaranteed was maintained. This is clearly contrary to this Court's pronouncements on both the duration and the ultimate purpose of school desegregation remedies. For these reasons this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 93-3975

Kalima Jenkins, by her friend, Kamau Agyei; Carolyn Dawson, by her next friend Richard Dawson; Tufanza A. Byrd, by her next friend, Teresa Byrd; Derek A. Dydell; Terrance Cason, by his next friend, Antoria Cason; Jonathan Wiggins, by his next friend, Rosemary Jacobs Love; Kirk Allan Ward, by his next friend, Mary Ward; Robert M. Hall, by his next friend, Denise Hall; Dwayne A. Turrentine, by his next friend, Sheila Turrentine; Gregory A. Pugh, by his next friend, David Winters, on behalf of themselves
and all others similarly situated;
Appellees,

American Federation of Teachers, Local 691,
Intervenor,

v.

State of Missouri; Mel Carnahan, Governor of the State of Missouri; Bob Holden, Treasurer of the State of Missouri; Missouri State Board of Education; Peter Herschend, Member of the Missouri State Board of Education; Raymond McCallister, Jr., Reverend, Member of the Missouri State Board of Education; Susan D. Finke, President, Member of the Missouri State Board of Education; Thomas R. Davis, Member of the Missouri State Board of Education; Robert E. Bartman,

Commissioner of Education of the State of Missouri; Gary D. Cunningham, Member of the Missouri State Board of Education; Rebecca M. Cook, Member of the Missouri State Board of Education; Sharon M. Williams, Member of the Missouri State Board of Education; Jacquelline Wellington, Member of the Missouri State Board of Education;
Appellants,

School District, of Kansas City; Walter L. Marks, Superintendent thereof,
Appellees.

Submitted: March 31, 1994
Filed: May 3, 1994

Appeal from the United States District Court for the Western District of Missouri.

Before McMILLIAN, Circuit Judge, HEANEY and JOHN R. GIBSON, Senior Circuit Judges.

JOHN R. GIBSON, Senior Circuit Judge.

The State of Missouri again appeals, the second time in less than a year, an order of the district court[1] approving *Milliken II*[2] quality education programs. *Jenkins v. Missouri*, No. 77-0420-CV-W-4 (W.D. Mo. July 30, 1993). In this appeal of the programs ordered for the school years 1993-94 and 1994-95, the State asserts the same argument that we rejected with respect to the 1992-93 school year in *Jenkins v. Missouri*, 11 F.3d 755 (8th Cir. 1994) (*Jenkins IX*) (as amended on denial of rehearing), *rehearing en banc denied*, No. 90-2238 (8th Cir. Mar. 15, 1994). The State made only minor additions to the record the district court had already considered in earlier orders relating to the quality education issues and to the argument that these programs should be declared unitary under *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). The State also argues that one component of the quality education programs, the funding for the full-day kindergarten program, has been rendered redundant by the passage of Missouri Senate Bill 380, affecting the school foundation formula. We affirm the district court's order and its decision on the quality education programs.

When KCMSD moved to continue the *Milliken II* quality education programs for the school years 1993-94 and 1994-95, the State raised the *Freeman v. Pitts* argument, as it had with respect to the 1992-93 year. The court held a one-day hearing. KCMSD presented very abbreviated

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[1]The Honorable Russell G. Clark, Senior United States District Judge for the Western District of Missouri.

[2]*Milliken v. Bradley*, 433 U.S. 267 (1977). These programs included reduced class size, attainment and maintenance of AAA status, full-day kindergarten, early childhood education, extended day, effective schools, and district communications.

testimony from Dr. Arthur Rainwater that his earlier testimony[3] about the *Milliken II* quality education programs was unchanged -- that there was substantial possibility for further improvement, and that the systems were working well. Cf. *Jenkins IX*, 11 F.3d at 765 (summarizing Dr. Rainwater's similar testimony at earlier hearing). The State presented no live witnesses on this issue, but filed a declaration from Dr. Terrance Stewart, essentially reiterating his testimony from the earlier hearing. Cf. *Jenkins IX*, 11 F.3d at 764-65 (summarizing Dr. Stewart's testimony at earlier hearing).

The district court in an order entered July 30, 1993 approved continuation of the *Milliken II* quality education programs for the school years 1993-94 and 1994-95.[4] The

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[3]The district court held an extensive hearing on approval of the *Milliken II* quality education programs for the 1992-93 year, which we have described in *Jenkins IX*, 11 F.3d at 764. While KCMSD's motion to renew those programs was pending, *Freeman v. Pitts* was decided. The State then asked that the *Milliken II* quality education programs be declared unitary under the approach articulated in *Freeman* and *Board of Education v. Dowell*, 498 U.S. 237 (1991). On June 17, 1992 the district court ordered continuation of the *Milliken II* programs for the 1992-93 year, and we affirmed. See *Jenkins IX*, 11 F.3d at 760. We cited as additional support for the district court's order its April 16, 1993 consideration of the *Freeman* issue in adopting the long range magnet renewal plan, and also the district court's July 30, 1993 order concerning the *Milliken II* programs. *Jenkins IX*, 11 F.3d at 761-62. We have ordered, on the State's motion, that the record before the court in *Jenkins IX* be made a part of the record before the court in this appeal.

[4]At the time of our decision in *Jenkins IX*, we had before us that portion of the July 30, 1993 order dealing with salary issues, but the portion of the order relating to *Milliken II* programs had not been appealed. *See* 11 F.3d at 762. After the district court denied the

district court articulated its reasons for rejecting the *Freeman v. Pitts* argument in some detail. The district court found the State's arguments that these components were unitary to be unpersuasive. While the quality education components had been partially successful, they had not yet met the goals in their entirety. The State appeals again, relying on the same arguments it advanced in *Jenkins IX*.

I.

In *Jenkins IX*, we affirmed the June 17, 1992 order concerning the *Milliken II* quality education programs for 1992-93. We stated:

> The only evidence before the district court with respect to the degree of progress on elimination of vestiges of past discrimination was at best that a start had been made. The evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable. These tests, articulated in *Dowell* and *Freeman*, answer the State's argument that establishment of the programs by compliance with the court order is all that is required.
>
> . . .

State's motion for reconsideration on October 20, 1993, the State appealed on the *Milliken II* issues. During argument of *Jenkins IX* the parties did not refer to the July 30, 1993 order, nor was it mentioned in the argument of *Jenkins v. Missouri*, 13 F.3d 1170 (8th Cir. 1993) (*Jenkins X*). In *Jenkins IX* we discussed the *Milliken II* quality education portion of this order insofar as it "fleshes out the meaning of the earlier district court orders." 11 F.3d at 762.

> The State did not try to prove that it has demonstrated a good faith commitment to the whole of the court's decree.

11 F.3d at 765 (citations omitted).

The record now before us relevant to the *Freeman* issue has been supplemented to only a minor degree since the *Jenkins IX* appeal. Examination of the record before the district court when it made its order of July 30, 1993, as well as a review of the record made before its June 17, 1992 order, demonstrate the validity of our conclusions in *Jenkins IX*: that the State did not try to prove a history of good faith commitment to the whole of the court's decree; that the only evidence before the district court was that at best a start had been made; and that the evidence fell short of establishing that the vestiges of past discrimination had been eliminated to the extent practicable. 11 F.3d at 765. The State essentially repeats its arguments in *Jenkins IX* and argues that *Jenkins IX* was wrongly decided. We reject the State's argument on the merits. The court en banc has denied rehearing in *Jenkins IX*, see *Jenkins v. Missouri*, No. 90-2238 (8th Cir. March 1, 1994) (denying rehearing en banc). *Jenkins IX* governs our decision in this case on a record that is essentially identical on the *Freeman* issues.

There is still further reason why we must affirm. As our earlier opinion reflected, and as the record before us in this appeal demonstrates, the position of the State is that having implemented and funded these *Milliken II* programs for a seven year period, its obligation should end.[5] There can be

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[5]The State says that its position in the district court was that "*Pitts* justified either an immediate or gradual return to the KCMSD of control and responsibility for the *Milliken II* programs." It

no doubt that this was its position in *Jenkins IX*,[6] and it

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summarized its argument by stating that it is "entitled to a declaration of unitary status with regard to the *Milliken II* quality education programs in place in the KCMSD." Further, "with regard to the quality of education component . . . the State sought withdrawal of District Court supervision after presenting evidence of compliance with the desegregation decrees of the District Court."

"The State argued in *Jenkins IX* that it had complied fully with the district court's desegregation decree as to the *Milliken II* programs, "and is entitled to have this aspect of [KCMSD] operations declared unitary, at least regarding the State's obligations." "Because of the State's record of full and satisfactory compliance with this aspect of the desegregation decrees and because the State can do no more to ensure provision of quality education and remedial programs to the KCMSD than it has already done by funding the programs, the State meets squarely this measure of 'unitariness' for the *Milliken II* aspect of the desegregation remedy." The State argued that "this Court should either declare the *Milliken II* aspect of KCMSD's operations to be unitary" or reverse and remand for specific findings of facts.

Before the district court on the motion which led to *Jenkins IX*, the State first filed a rather general objection to the budget for the 1992-93 school year on February 7, 1992. After the decision in *Freeman*, the State filed a response with respect to this school year in which it stated: "*Pitts* supports the immediate elimination of the Year VIII [1992-93] programs as the first step in a phaseout process, the purpose of which is to ultimately totally reestablish local control over school district operations." "[T]he State believes the programs should be returned to local control with extraordinary funding ended now. In the alternative . . . a brief phaseout period could be imposed, gradually increasing the KCMSD responsibility for continued implementation and actual funding of the annual budget programs through its local autonomy and local resources." "It will be up to the KCMSD to decide whether, in what form and to what extent, to continue the programs at issue." "The [c]ourt here can take the first step toward returning control of the KCMSD to the local authorities by terminating its supervision over these annual budget programs,

maintains the same position today. The implications of the State's position were addressed head-on by the dissent from the denial of rehearing en banc in *Jenkins IX*:

> If the State's claim carries with it the unstated idea that having put the elements of a quality educational program in place it may now take its money and exit, stage left, leaving the KCMSD to finish the scene alone, I believe that partial unitary status is not at hand. But, if an equal opportunity to receive a quality education is now permanently available to each student in the KCMSD, and is thus available to erase, if the opportunity is reasonably pursued, the vestiges of past discrimination, then unitary status has been reached and control should be relinquished by the federal courts to the state and local governments.

No. 90-2238, *slip op.* at 26 (8th Cir. March 15, 1994) (Beam, J. dissenting, joined by Bowman, Wollman, Loken and Morris Sheppard Arnold, JJ.).

The State's position has simply been that its obligation for these programs is concluded and, in the colorful wording of the dissent, that it should "now take its money and exit, stage left." *Id.* This is precisely the meaning of the State's argument that its responsibility and obligation should be terminated. This has been rejected by the judges voting to deny rehearing en banc, and most tellingly by the five judges joining in the dissent to denial of rehearing.

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and requiring the District to resume both control and the fiscal responsibility for the continuation of such programs. . . ."

Even when the State makes its alternative argument that if the programs are not terminated, they should be phased out gradually, the result would be increased financial burden on KCMSD. This would raise a serious possibility of substantial elimination or disruption of the quality education programs. Again, the dissent from the denial of rehearing explicitly stated in *Jenkins IX* that "equal opportunity to receive a quality education" should be "*permanently* available to each student in the KCMSD." *Id.* at 26 (emphasis added).

So far as the State is concerned, the crux of its responsibility for the *Milliken II* programs is funding. KCMSD must administer and operate these programs. The State seeks termination of the obligation to fund its share of the cost of these programs. The problem that remains, as the district court has been so mindful during the course of this litigation, is the KCMSD's ability to fund these programs.

As we mentioned in *Jenkins IX*, the district court has called for the parties to submit plans for financing "the magnet schools and the entire school district at a level commensurate with the current funding or at least at a level where the same quality of both facilities and instruction may be maintained," assuming withdrawal of court-ordered fundings within three, five, seven and ten years, alternatively. Order of April 16, 1993, *slip op.* at 21. The court's order has thus focused sharply on the *Freeman-Dowell* issues. The language of the district court's order in calling for such proposals is sufficiently broad to cover both the phase-out of the magnet school program funding and the *Milliken II* funding.

We are aware that the parties have now made filings with the district court pursuant to the April 16, 1993 order, and we presume that the district court will in time conduct hearings on these issues. In *Jenkins IX*, we outlined many of those considerations:

> Among the factors which must inform *the sound discretion* of the court in ordering partial withdrawal are the following: whether there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn; whether retention of judicial control is necessary or practicable to achieve compliance with the decree in other facets of the school system; and whether the school district has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance.

11 F.3d at 763-64 (quoting *Freeman*, 112 S. Ct. at 1446 (emphasis added in *Jenkins IX*)). We framed the inquiry as outlined in *Dowell*:

> [T]he Supreme Court stated that in determining whether there was constitutional compliance in a school desegregation case, the district court "should address itself to whether the Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past

> discrimination had been eliminated to the extent practicable. . . ."

Jenkins IX, 11 F.3d at 763 (quoting *Dowell*, 498 U.S. at 249-50).

The State argues that it has demonstrated its good faith commitment to all of the court's decrees, and that its objection to numerous aspects of the desegregation program in litigation does not negate such commitment or reflect an unwillingness or intransigence toward achieving the goal of providing equal educational opportunity. It argues that it has clearly met the Supreme Court standards for good faith commitment. In essence, the State is asking this court to determine an issue which the Supreme Court in *Dowell* and *Freeman* has made clear is an issue for factual determination by the district court. As we said in *Jenkins IX*, and as the record reflects in the appeal before us, the State has not attempted to make a factual showing on this issue for determination by the district court. 11 F.3d at 765. This issue must first be developed by the district court.

When the district court considers the *Freeman* and *Dowell* issues drawn into sharp focus by its order of April 16, 1993, and now briefed in detail by the parties, we are satisfied that the court will be mindful of its responsibility to make detailed fact-findings as it considers the several inquiries required by *Freeman* and *Dowell*. The long history of this litigation demonstrates that that order will likely be the subject of an appeal, and the district court will render substantial assistance to review on appeal by making a full and complete record. We are confident that when the district court's order is entered, we will have an adequate record before us for our review.

II.

The State also argues that passage of Missouri Senate Bill 380 requires an adjustment in the State's desegregation liability. Senate Bill 380 counts a full-time kindergarten child as one student for purposes of computing the foundation formula aid for school districts in Missouri, whereas the earlier formula counted such children as one-half a student. The State currently pays part of the cost of full-day kindergarten as a *Milliken II* quality education cost. As a result of the combination of Senate Bill 380 and the State's *Milliken II* obligations, the State argues that KCMSD will receive payments greater than the total cost of the full day kindergarten program, and that this is a windfall.

It must first be recognized that the funding under Senate Bill 380 measured by full-day kindergarten students need not be spent on kindergarten programs. It is simply a way of measuring allocations of general state aid that can be used for any school purpose.

The district court recognized that the future impact of Senate Bill 380 was far from certain. The State's witnesses testified that the exact amount KCMSD would receive could be significantly different due to a change in the method by which all students are counted, with the new system relying more heavily on daily attendance than the old system. There is a gradual phase-in of Senate Bill 380 formula in increments of 25% over a four year period, and the new formula would not be entirely implemented until the 1996-97 school year. Further, the appropriation process could increase or decrease the amount of money available, as could the amounts withheld for growth. In addition, there are uncertainties due to the state finance litigation.

These uncertainties are reason enough for affirming the district court's decision to reject the State's argument. Exactly what KCMSD may receive and when it will receive it because of change in the foundation formula is yet to be determined.

The State has not demonstrated that the district court made findings of fact that were clearly erroneous, or abused its discretion in rejecting the State's request to allow an off-set of the full-day kindergarten monies to reflect amounts received under Senate Bill 380.

We affirm the order of the district court.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS,
EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: July 30, 1993]

The Court has pending before it several motions regarding the desegregation programs in the KCMSD. The first matter is the joint motion of the KCMSD and plaintiffs for approval of next two years of *Milliken II* desegregation plan. Also before the Court is the motion of the KCMSD for approval of final FY92 costs for temporary relocation of students and programs ("Staging"). Lastly, the KCMSD has filed a motion to alter or amend the Court's Order of June 30, 1993 ("Salary Order").

The AFT has responded to the KCMSD's motion to alter or amend the Salary Order. Additionally, the State has responded to the motion as well. The Court has previously indicated to the parties through informal communications that it intended to issue an order clarifying the Salary Order

and will do so in response to the KCMSD's motion to alter or amend. The Court will grant the KCMSD's motion in part and deny it in part.

With respect to the motion for approval of final FY92 staging costs, the parties have informally made known to the Court that there was no opposition to the District's motion. A response has not been filed by any party. The Court having duly considered the merits of the KCMSD's motion for final FY92 staging costs will grant the KCMSD's motion as proposed.

The State has responded to the joint motion with respect to the *Milliken II* component of the desegregation program. A joint stipulation was filed in this matter resolving many of the components of the *Milliken II* program. On July 7, 1993, the Court held a hearing on the remaining disputed items in the joint proposal. Upon consideration of the evidence presented at the hearing and the arguments made by the parties in pleadings previously submitted, the Court will grant the joint motion in part and deny it in part in accordance with the following discussion.

MILLIKEN II

The remaining *Milliken II* components for which the State has alleged factual disputes are (1) inclusion of additional special education teachers in the Base Budgets; (2) use of the 1986-87 level for determination of the appropriate level of maintenance spending; (3) enhancements to the security program currently in effect; (4) extension of the Effective Schools program; (5) inclusion of the Full-Day Kindergarten program without offset for monies received as a result of S.B. 380. The State further argues that the Court should reject the joint motion *in toto* because the KCMSD

has attained the sufficient levels of desegregation called for under *Freeman v. Pitts*, 112 S.Ct. 1430 (1992). Based on this argument the State urges the Court to deny any additional funding of *any* of the *Milliken II* components requested in the joint motion. Lastly, the State again calls for an order of the Court expressly establishing a right of contribution in the State for monies expended under the previous orders of the Court allowing for joint and several liability for desegregation expenses in the KCMSD.

The Court will first address the State's argument that the desegregation programs called for under the *Milliken II* component have reached the necessary level of compliance with the desegregation decree in this case. The State offers the findings of the United States Supreme Court in *Freeman v. Pitts*, 112 S.Ct. 1430 (1992) in support of its arguments. In *Pitts*, the Court held that where a district court's desegregation order has been substantively complied with in certain areas the court may withdraw desegregation supervision of those areas even though the program has not been fulfilled in its entirety. The Court has heard evidence presented by the State in several recent hearings offered to show that the desegregation program in the KCMSD has been a complete failure. In the LRMP renewal hearing held early in this year the State repeatedly argued that the District has failed to show sufficient signs of improvement as a result of the magnet program to justify continuation of that program. The State has repeatedly taken the position that the desegregation programs ordered by the Court have been of absolutely no benefit to the school children of the KCMSD.

It appears now that the State is arguing that all is cured. The State, as it has in the previous *Milliken II* hearings, has argued that the programs covered under this component

have attained the necessary levels of desegregative effect and should therefore be turned over to the KCMSD for continued implementation. The Court has previously ruled as a result of the LRMP renewal process that the KCMSD has not met the goals and standards set by the Court in establishing the desegregation remedy. The *Milliken II* component is an integral part of the overall desegregation remedy and the Court finds that the State's arguments that these components have attained unitary status are unpersuasive. The State should not be heard to complain that the desegregation plan is a complete failure on the one hand and that the *Milliken II* components are completely successful on the other. The Court finds that the State has made fundamentally flawed arguments in pursuit of an order determining unitary status in the KCMSD. The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time. Therefore, the Court will order the continued implementation and funding of the *Milliken II* components for which the joint stipulation was entered for two years.

The Court will next consider the individual programs with which factual issues have been raised regarding their further implementation as part of the *Milliken II* component of the desegregation remedy. The first issue is inclusion of additional special education teachers in the Base Budgets. The State opposes the additional special education teachers on the basis that this expense is incurred as a result of an accounting mistake on the part of the District and the State argues that it should not be made to bear this burden. The Court finds that the teachers at issue herein are necessary

to meet the special needs of some students who choose to attend magnet programs. The fact that these positions have been the subject of a previous accounting error is irrelevant to the future consideration of desegregation expenses as a result of the need to provide these services. The Court finds that these positions are legitimate desegregation expenses and their inclusion in the Base Budgets is appropriate. Therefore, the Court will approve the requested addition to the Base Budget component.

Next, the Court will consider the use of the 1986-87 square footage level for determination of the appropriate level of maintenance spending. Mr. Robert Brogi, Deputy Superintendent, testified to the appropriate measurement of maintenance attributable to the desegregation program. In order to calculate this amount, Mr. Brogi compared the pre-remedy square footage to the post-remedy square footage and determined that the difference was the amount attributable to desegregation. He further testified that he believed that the maintenance in the KCMSD was getting better but there were some areas which could use improvement. The Court has reviewed the maintenance component submitted as a part of the *Milliken II* program and finds that the Maintenance plan is an appropriate component to the overall desegregation remedy. It is imperative that the District be able to maintain the programs made available as a result of the desegregation remedy and the Court will do everything in its power to see that this goal is met. However, the concept of using the 1985-86 as the base year for attributing desegregation expenses presupposes that the KCMSD would never have incurred any growth in its physical plant over the time period contemplated. The Court does not have an exact method of determining the precise amount of square footage attributable to desegregation. However, it is the belief of the

Court that the District should be responsible for some of the growth in the district and finds that the recommendation of the DMC to use August 1991 as the base year is the appropriate method for calculation. The Court will therefore order the extension of the maintenance component of the *Milliken II* component as proposed by the District with the modification that the base year for comparison be August 1991.

The Court will next consider the proposed enhancements to the security program offered by the District in the *Milliken II* proposal. Captain Livingston testified that the security of the KCMSD was a legitimate expense to be incurred by the desegregation program and that to fully implement the security plan it would need to be expanded as proposed. The Court concurs with Captain Livingston's assertion that the Security Component is a primary consideration in the implementation of the desegregation remedy. Moreover, the Court finds that the security of the school children and the staff of the schools is of utmost importance to the Court in fashioning the remedy in this case.

The Court does wish to express its concern over the submission of expenses for security as desegregation related expenses when there is no such relationship. These allegations were made during the hearing, but not fully substantiated. The Court would suggest to the district that it use all due diligence in tracking such expenses and ensuring that there is no opportunity for misapplying already scarce resources. The Court will not look favorably on a return of such claims. The Court does not believe that it is imperative to have the additional officers as requested by the reorganization of the security department. While it is the Court's opinion that there is no question that the

additional personnel would heighten security the Court does not believe that the changes, as proposed, are fiscally sound. Therefore, the Court will deny the request for additional staffing.

It is appropriate at this point for the Court to note that the City has a vested interest in the school system being rebuilt. The Court has gone to great lengths to provide the KCMSD with facilities and opportunities not available anywhere else in the country. The City must take some responsibility in maintaining these schools. The City receives the benefit of the attractiveness and acclaim of these schools. However, it appears to the Court that the City has shirked its responsibility in maintaining the school system being provided to it. It is entirely appropriate for the Police Department of Kansas City, Missouri to supply security to schools that are in need. The police in Kansas City have the responsibility of protecting its citizens and the many thousands of school children are just as deserving as any other citizen. The Court urges the District to approach the City and attempt to coordinate some provision of security by the police department whether it be in the form of sub-stations or some other alternative. It is incumbent on the City to be responsible for *all* of its citizens.

The Security proposal included the request for additional vehicles. Captain Livingston testified that should the request for additional personnel be denied that there would be no need for additional vehicles. The Court, having found that the additional personnel will not be provided, further finds that the request for additional vehicles will also be denied. The KCMSD has proposed the addition of walk-thru metal detectors for purposes of security. The Court finds that the climate of activity in the KCMSD is such that this is a reasonable expense. The Court will therefore grant the

request for walk-thru metal detectors. The Court will extend the Security component of the *Milliken II* program for a concurrent two-year time period with the other components but the Court will deny the requested additions to the Security component with the exception of the walk-thru metal detectors.

The Court will next consider the proposed extension of the Effective Schools program. The State has taken the position that the District failed to present any evidence for evaluation of the Effective Schools program and that the motion for extension of that component should therefore be denied. The District and plaintiffs argue that there exists no evidence of success or failure as the data has not been available for evaluation. The data will be available at the end of the 1993-94 school year to measure the impact of the Effective Schools program. The plaintiffs further argue that the Court, in its previous order, adopted the Effective Schools program for two years but funded it for only one. The plaintiffs argue that it was implicit in the Court's previous order that it would extend funding for the second year even though it would be impossible to evaluate the program as the data would not yet be available. The Court finds that the Effective Schools program should be extended for one additional year per its previous order. The District is directed to continue to collect data to evaluate the impact of the Effective Schools program. The Court, in considering the appropriateness of a further extension of the Effective Schools program at the end of FY93-94, will expect that the District be able to submit a detailed analysis of the impact of this program for the Court's review at that time. The Court will therefore grant the District's motion for extension of the Effective Schools component and appropriate funding for FY93-94.

The Court will next consider whether the inclusion of the Full-Day Kindergarten program without offset for monies received as a result of S.B. 380 is an appropriate component of the *Milliken II* program. The Court has previously found that the Full-Day Kindergarten was a benefit to the desegregation effort in the KCMSD and an essential part of the remedy. The Court finds that the evidence presented at the hearing on this issue did nothing to change the Court's perception of this program. It is fundamental that the school children of the KCMSD be given every advantage at the earliest possible age and this program addresses that need. The State argues that the District is receiving a windfall because Full-Day Kindergarten is a qualifying requirement for certain monies under the new school foundation formula known as S.B. 380. The Court finds that the fact that the district receives additional resources from the State's formula because a portion of the formula recognizes the benefits of the Full-Day Kindergarten program is of no consequence when determining whether to include that program as part of the remedy. The Court has found that the State is a constitutional violator and is required to fund the remedy as ordered by the Court. The fact that the District is going to receive additional revenues under the new foundational formula is irrelevant to the consideration of obligations due the plaintiff school children as a result of the constitutional violations of the State. The Court will not allow the offset of Full-Day Kindergarten monies by any additional amount received under S.B. 380. The Court will grant the joint motion with respect to the Full-Day Kindergarten component as proposed.

SALARY ORDER

With respect to the KCMSD's motion to alter or amend the Salary Order the Court has previously indicated its inclination to issue an order clarifying its original opinion. The Court has fully considered the arguments presented by the parties and finds that there exist two major issues to be addressed. First, is the issue of whether there is to be an actual cash outlay to current teachers in compensation for lost steps. It was the original intention of the Court to put the teachers in FY93-94 on the step where they would have been had there been consistent step increases in the past. The Court by its June 30, 1993 Order did not intend to have the District make a cash outlay to the teachers for foregone step increases. However, the teachers currently in the district will receive the prospective benefit of lost step increases by being placed on the higher steps for which they are eligible.

The next issue addressed by the KCMSD's motion to alter or amend the Salary Order is in the area of step increases for administrators. In its Order of June 30, 1993 the Court intended to restore lost step increases *only to teachers*. The Court granted a two percent pay increase to the administrators and it was the intention of the Court that such pay increase be a flat rate increase. As a matter of illustration, an administrator who made $100 in FY92-93 would receive $102 in FY93-94 and a similar two percent increase in each of the other years covered by the Salary Order. The Court did not intend to adopt the salary proposal of the District which allowed for step increases for administrators. It was the sole intention of the Court that the administrators receive a two percent flat rate increase. The Court, by this Order, does not intend to disparage the administrators and other non-represented personnel of the

KCMSD and finds specifically that the proper administration of the district is imperative to the continued success of the desegregation program. However, as a matter of fiscal conservatism in the face of the budget constraints faced by the District the Court finds that it is appropriate only to allow for a small increase in compensation at this time. The Court believes that the District may have opportunity to provide further increases through the operating budget for administration but further finds that a sufficient level of support is currently provided through desegregation funding.

The KCMSD next queries whether it was the Court's intent to disallow the equity adjustments previously provided by the Court in its Order of June 25, 1992. The Court finds that this equity adjustment for administrative and non-represented personnel was previously approved by the Court but not fully implemented by the District. While this adjustment would result in an initial increase of over two percent in FY93-94 it is the intention of the Court that this equity adjustment be allowed. The Court having previously allowed such an adjustment is not inclined to subsequently disallow it. The Court considered the flat rate two percent per year incremental adjustment ordered on June 30, 1993 to be made in addition to the equity adjustments approved in the June 25, 1992 Salary Order. Therefore, the Court will disallow the step increases for those persons contemplated by the District's motion but the Court will again approve the equity adjustments allowed in the June 25, 1992 Salary Order.

The last issue for consideration by the Court is the State's motion for an order expressly establishing a right of contribution both retroactively and prospectively. The matter was originally brought before the Court as a part of

the Salary dispute previously resolved by the Court's Order of June 30, 1993. The Court is currently in the process of evaluating the submissions of the parties on this issue and expects that a ruling will issue in the near future. However, as of this date, the Court will not announce its findings as to the contribution issue. The Court will defer ruling on this issue at this time.

Accordingly, it is hereby

ORDERED that the KCMSD's motion for approval of final FY92 staging costs is approved; and it is further

ORDERED that the KCMSD's motion to alter or amend the Court's June 30, 1993 Salary Order is granted in part and denied in part; and it is further

ORDERED that the step increases for administrators and other non-represented personnel contemplated by the KCMSD's motion to alter or amend the Salary Order of June 30, 1993 are not allowed by the Court; and it is further

ORDERED that the equity adjustments previously ordered by the Court in its June 25, 1992 Salary Order are again approved for inclusion in the Salary Order of June 30, 1993 as amended herein and that the administrators and other non-represented personnel are to receive a flat two percent per year increase in compensation; and it is further

ORDERED that the joint motion for approval of *Milliken II* funding is granted in part and denied in part; and it is further

ORDERED that the joint motion with respect to those items subject to the joint stipulation is granted; and it is further

ORDERED that the joint motion with respect to the adjustment for special education teachers in the Base Budget component is granted; and it is further

ORDERED that the joint motion with respect to the maintenance component is granted except that the District is directed to use August 1991 as the baseline for calculation of desegregation related maintenance expenses; and it is further

ORDERED that the joint motion with respect to the security component is granted in that the current budget is ordered extended but the Court denies the motion for additional personnel or equipment except the Court will allow the expenditure of desegregation funds for walk-thru metal detectors as proposed; and it is further

ORDERED that the joint motion with respect to the Effective Schools is granted and funding is approved for FY93-94 and the District is directed to submit to the Court a complete evaluation of the program in the event the District returns to the Court for renewal of funding; and it is further

ORDERED that the joint motion with respect to Full-Day Kindergarten is granted and the State's request for offset of S.B. 380 monies is denied; and it is further

ORDERED that the Court approves the budgets as submitted except as modified herein with joint and several liability; and it is further

ORDERED that the District shall use the AAA minimum standard; and it is further

ORDERED that the motion of the State for an order expressly establishing a right of contribution is deferred pending further analysis by the Court.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: July 30, 1993

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, et al.,
Plaintiffs,

vs.

STATE OF MISSOURI, et al.,
Defendants.

ORDER

[Filed: October 20, 1993]

This matter comes before the Court on the State's Motion to Alter or Amend the Court's Order of July 30, 1993 concerning the Full-Day Kindergarten component of the *Milliken II* funding. The District has responded to the State's motion. For the following reasons the Court will deny the State's motion.

The State has moved the Court to alter or amend its previous Order with respect to the Full-Day Kindergarten component of the *Milliken II* funding. The State argues that the implementation of Senate Bill 380 by the Missouri Legislature would provide the District with double funding of its Full-Day Kindergarten program. The State argues that the Court should allow the State to offset the amount of monies paid for Full-Day Kindergarten under the

desegregation order by the amount the State is compelled to pay under the Foundation Formula as determined under S.B. 380. The State further argues that the Court has made like adjustments for the Early Childhood and Summer School programs.

The District has replied to the State's motion arguing that the Court properly considered the evidence presented in making its original ruling and that the State has offered no new evidence or changed circumstances to necessitate any alteration or amendment to the Court's previous ruling. The District argues that the Court clearly considered and rejected the State's current argument when the Court initially decided this issue. Moreover, the District argues that the Full-Day Kindergarten program is inherently different from the Summer School and Early Childhood programs in that the Kindergarten program was funded by the operating budget before any desegregation decree was made. The District requests that it not be penalized as against other districts in the state just because it is under a desegregation order of this Court.

The Court finds that the State's argument is not well taken at this time, just as it was not well taken at the time the Court made its original ruling. The Court clearly considered these arguments in deciding this issue in the first instance and did not 'misunderstand' any of the arguments made by the State. The Court further finds that the State is bound by S.B. 380 to provide to the schoolchildren of Missouri the monies determined by the Foundation Formula. The State has chosen to make a Full-Day Kindergarten a driving factor in determining the appropriate funding levels for each school in the state. The fact that the Court has ordered the State, a constitutional violator, to help fund under *Milliken II* the Full-Day Kindergarten program is irrelevant to the

consideration of S.B. 380 monies. The State is merely attempting to circumvent its obligation under this Court's desegregation order by offsetting monies it is required to pay under S.B. 380. The Court finds the State's argument unconvincing in this regard and will therefore deny the State's motion to alter or amend the Court's Order of July 30, 1993.

Accordingly, it hereby

ORDERED that the State's Motion to Alter or Amend the Court's Order of July 30, 1993 is denied.

/s/ Russell G. Clark
RUSSELL G. CLARK,
SENIOR JUDGE
UNITED STATES
DISTRICT COURT

Date: October 20st, 1993

Supreme Court, U.S.
FILED
OCT 21 1994
OFFICE OF THE CLERK

No. 94-434

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

STATE OF MISSOURI, *et al.*,
Petitioners,
v.
KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the lower courts acted within their discretion in refusing to terminate remedial educational improvement programs as "unitary" where the same courts had properly refused to do so in the previous year and where the State defendants seeking such termination the second time neither moved the trial court for a declaration of partial unitary status nor offered any significant additional evidence even attempting to satisfy their burden, articulated by this Court in *Freeman v. Pitts*, to prove that (1) the vestiges of segregation which such programs were designed to remedy had been eliminated to the extent practicable; (2) a release of jurisdiction in these areas would not have adverse consequences on other admittedly non-unitary aspects of the school system; and (3) the defendants had demonstrated a good faith commitment to their constitutional obligations.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-434

STATE OF MISSOURI, *et al.*,
Petitioners,

v.

KALIMA JENKINS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

BRIEF IN OPPOSITION OF RESPONDENTS

COUNTERSTATEMENT OF THE CASE

The Court described the background of this case in *Missouri v. Jenkins*, 495 U.S. 33, 37-45 (1990). The Court also recently granted *certiorari* in *Missouri v. Jenkins*, 11 F.3d 755 (8th Cir. 1993), *cert. granted*, 62 U.S.L.W. 3794 (U.S. Sept. 16, 1994) (No. 93-1823). Both that Petition and this one involve attempts by the State of Missouri (the "State") to terminate prematurely educational improvement elements of the desegregation remedy for Kansas City, Missouri public school students. These educational programs are integral parts of a remedy that the lower courts have found is working, but has not yet eliminated to the extent practicable the vestiges of more than a century of racial segregation that the State mandated in the Kansas City, Missouri School District ("KCMSD" or the "District"). *See, e.g.*, App. 5-7, 16-

17.[1] The State has brought this issue before the district court and the Eighth Circuit twice now, and the lower courts both have concluded twice that the State has failed to meet, indeed in most respects failed even to address, its burden of proving partial unitary status.

The State, however, does not ask this Court in the present Petition to review the mundane factual issue of the inadequacy of its proof, but rather the dramatic-sounding legal question of whether a federal court may order a perpetual remedy in a school desegregation case. Pet. i. This question, however, is not presented by the decisions below, which ordered no such thing. Rather, the question presented here, as in No. 93-1823, is whether the lower courts properly concluded that the educational programs should not be terminated as "unitary," because of the unchallenged facts: (1) that vestiges of segregation remain and can practicably be remedied; (2) that the termination of these programs would make it impossible for the defendants to comply with orders in other areas that the State has admitted are not unitary; and (3) that the State has made no showing of its good faith commitment to the district court's orders. App. 5-7. As a result, this Court should not grant *certiorari* here but, at most, hold this Petition pending the disposition of No. 93-1823.

THE PRIOR PROCEEDINGS

The State's Petition arises from its opposition to the District's motion to continue for the 1993-94 and 1994-95 school years a series of educational programs that were part of the district court's original remedy in this case. The remedy was ordered because, in September 1984, after a 92-day trial, the district court (The Honorable Russell G. Clark) found both the State and the District

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[1] In this opposition, we cite the Petition as "Pet."; the Appendix attached to the Petition as "App."; the Appendix attached to this opposition as "Opp. App." and the Appendix attached to the Petition in No. 93-1823 as "93 App."

liable for unconstitutionally segregating the schools of KCMSD for a century and for failing for three decades in their affirmative duty to undo the harm of that segregation. Judge Clark found that the "inferior education indigenous of the state-compelled dual school system has lingering effects in the Kansas City, Missouri School District," and that State-mandated segregation has resulted in the continued racial isolation of minority students. *Jenkins v. Missouri*, 593 F. Supp. 1485, 1492-93 (W.D. Mo. 1984).

Judge Clark recognized "the frequent admonition from the Supreme Court to tailor the remedy to fit the scope of the violation," June 5, 1984 Order at 97, and that "the goal of a desegregation decree . . . is the elimination of all vestiges of state imposed segregation." *Jenkins v. Missouri*, 639 F. Supp. 19, 23 (W.D. Mo. 1985), *aff'd as modified*, 807 F.2d 657 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987). The most important vestiges he found were "a system wide *reduction* in student achievement in the schools of the KCMSD," *id.* at 24 (emphasis in original); "low achievement" and a "general attitude of inferiority among blacks," 593 F. Supp. at 1492-93; racial isolation in the schools, *id.*; and severe deterioration in the physical conditions of the schools. 639 F. Supp. at 39.[2]

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[2] Many school buildings in the KCMSD had "literally rotted" as a result of the dual system. *Jenkins v. Missouri*, 672 F. Supp. 400, 411 (W.D. Mo. 1987), *aff'd in relevant part*, 855 F.2d 1295 (8th Cir.) (*en banc*), *cert. denied in relevant part*, 490 U.S. 1034 (1989). Moreover, the court found that the lack of revenue that had caused this deterioration flowed directly from the State's failure to remedy its previous unconstitutional segregation: "[T]he State of Missouri by its constitutional violations and subsequent failure to affirmatively act to remove the vestiges of the dual school system certainly contributed to an atmosphere which prevented the KCMSD from raising the funds to maintain its schools." *Id.* at 403. In affirming the latter finding, the Eighth Circuit expressly noted that the State's failure to remedy its unconstitutional conduct fostered further segregation: "The findings of fact demonstrate a spiraling effect of

Judge Clark rejected mandatory busing within or between districts as a remedy for these conditions and found that desegregation in KCMSD could best be accomplished through a largely voluntary desegregation plan based on educational improvements, voluntary student transfers to specialized magnet schools, capital improvements, and voluntary interdistrict transfers. The cornerstone of this voluntary desegregation remedy consisted of the basic educational improvements, known among the parties as *Milliken II* programs because they generally are relief of the type that this Court first expressly approved in *Milliken v. Bradley*, 433 U.S. 267 (1977) ("*Milliken II*"). They include additional teachers to reduce class sizes to appropriate levels, counselors, librarians and library materials to meet State AAA-rating requirements, a full-day kindergarten program, an early childhood education program, an extended school day in selected schools, and a summer school program. The Eighth Circuit has repeatedly recognized that these programs have three complementary goals: (1) to remedy the systemwide reduction in student achievement by improving the education available to the plaintiff school children; (2) to bring about a voluntary redistribution of children within the KCMSD; and (3) to reverse the state-initiated pattern of decreasing non-minority enrollment by attracting back white students who had been driven to attend private and suburban schools as a result of the constitutional violations. *See e.g., Jenkins*, 855 F.2d at 1301-02.

The State did not appeal Judge Clark's determination that the State and KCMSD had failed to remedy the effects of their unconstiutional segregation. Neither did it appeal "substantial portion[s]" of the remedial order, including the implementation of the educational programs designed in part to remedy the systemwide reduction in

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white children leaving KCMSD schools and KCMSD's white constituency withdrawing its financial support from the system. This process eventually caused the decay of KCMSD's school buildings, which in turn fed the cycle." 855 F.2d at 1305.

student achievement in KCMSD. *Jenkins v. Missouri*, 807 F.2d 657, 682 (8th Cir. 1986) (*en banc*), *cert. denied*, 484 U.S. 816 (1987).

In the spring of 1992, the plaintiff school children and the KCMSD moved the district court to order the continuation of certain of these educational improvement programs for one year. The State, on the heels of this Court's decision in *Freeman v. Pitts*, 112 S. Ct. 1430 (1992), argued in their brief in response to this motion that these programs should be terminated because each was partially unitary.[3] The State, however, did not file a motion seeking such relief and presented no evidence to the trial court concerning most of the several necessary inquiries described by this Court in *Freeman*, and Judge Clark summarily rejected the State's argument. *See* Opp. Cert. No. 93-1823 at 6-7.[4]

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[3] On the other hand, the State also argued that several of these same programs should be terminated because they were ineffective. The State subsequently stipulated to the scope of the proposals and to the budgets for more than half of the *Milliken II* programs, while reserving its argument that they were "unitary."

[4] While the State's first appeal on the partial unitary status question was pending, Judge Clark held a three-week hearing concerning the proposed continuation of the magnet school component of the remedy. The State did not argue that this component of the remedy was unitary but that it was ineffective. The State presented extensive evidence attempting to demonstrate the desegregative and educational failures of the remedy. Judge Clark, however, found that the progress in desegregating KCMSD's student enrollment has been "substantial." 93 App. 129. He found that KCMSD had eliminated segregation in "all fifteen elementary schools that had suffered the most intense racial isolation," made progress in integrating secondary schools (some of which had "achieved high levels of integration"), and "substantially improved" on an index of desegregation in the schools. *Id.* On the other hand, Judge Clark also concluded that more progress was necessary and practicably attainable. *Id.* Likewise, he specifically found that while "there has been a trend of improvement in academic achievement in the KCMSD," the District has not made sufficient progress. 93 App. 131.

On appeal, the Eighth Circuit affirmed on the ground that the State had failed to meet its burden of proving several of the prerequisites to a declaration of partial unitary status. *Jenkins v. Missouri*, 11 F.3d at 765; 93 App. 19. The court concluded that the "evidence on the record fell far short of establishing that such vestiges had been eliminated to the extent practicable." *Id.* The Eighth Circuit identified two other reasons why the States was not yet entitled to be released from its obligations. It had failed to meet, indeed failed even to address, two other criteria set forth by this Court in *Freeman*: "whether retention of judicial control [over the educational improvement programs] was necessary or practicable to achieve compliance with the decree in other facets of the school system," and whether "[t]he State . . . has demonstrated a good faith commitment to the whole of the court's decree." *Id.* In the spring of 1994, the Eighth Circuit denied the State's petition for rehearing *en banc* of this appeal. Even the dissenters from this denial noted that at most a remand would be appropriate because of the State's lack of proof on critical issues: "Whether the KCMSD has actually achieved partial unitary status in the quality of its educational program imposed by the desegregation plan is, perhaps, *still an open question on the record before us today.*" *Jenkins v. Missouri*, 19 F.3d 393, 400 (8th Cir. 1994); 93 App. 58 (emphasis added). This Court granted a writ of *certiorari* last month in No. 93-1823 to review those decisions.

In the meantime, in the spring of 1993, the plaintiffs and KCMSD again sought a further continuation of many of the same basic educational improvement programs for a discrete two-year period, the 1993-94 and 1994-95 school years.[5] The State again opposed this request, claim-

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[5] In 1994, the plaintiffs and the District sought to renew the remainder of these programs for the 1994-95 school year. The Court again held an evidentiary hearing and the State again submitted no new evidence in support of its partial unitary status

ing the programs were partially unitary. However, the State "made only minor additions to the record the district court had already considered in earlier orders relating to the quality education issues and to the argument that these programs should be declared unitary under *Freeman*," App. 3, and Judge Clark rejected the State's argument.[6] Judge Clark also pointed out that the State's own arguments and evidence from another hearing only a few months earlier, *see supra* note 4, undermined its unitary status argument and called into question its good faith:

> The *Milliken II* component is an integral part of the overall desegregation remedy and the Court finds that the State's arguments that these components have attained unitary status are unpersuasive. The State should not be heard to complain that the desegregation plan is a complete failure on the one hand and that the *Milliken II* components are completely successful on the other. The Court finds that the State has made fundamentally flawed arguments in pursuit of an order determining unitary status in the KCMSD. The Court does find that the *Milliken II* components have been partially successful in implementing the goals and standards of the desegregation remedy. However, these components have not yet

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argument. The State has not appealed the authorization of those programs for 1994-95.

[6] The State's only affirmative evidence on the *Freeman* issue was an affidavit from the same single witness who had briefly testified in support of partial unitariness at the 1992-93 hearing. This affidavit, a fair summary of *all* the record evidence in support of the *State's* argument, merely reiterates that the various *Milliken II* programs had been "fully implemented," had made more resources available in KCMSD, and in many instances had brought these educational inputs to a level equal to or higher than some neighboring school districts. Opp. App. at 1. The State's affidavit was silent on the State's good faith, the interrelatedness of the various remedial programs, and whether the remedy had succeeded in eliminating the vestiges of segregation to the extent practicable in KCMSD.

> met these goals in their entirety. The Court finds that it would be wholly inappropriate to deem the KCMSD unitary or partially unitary at this time. App. 17.

On appeal, the Eighth Circuit again rejected the State's claim. The court noted that the "State [had] presented no live witnesses on this issue, but filed a declaration from Dr. Terrance Stewart, essentially reiterating his testimony from the earlier hearing." App. 4. *See* Op. App. 1. As a result, the Eighth Circuit concluded unequivocally that its previous ruling in "*Jenkins IX* govern[ed] [its] decision in this case on a record that is essentially identical on the *Freeman* issues." App. 6. The court also discussed the point made by the dissenters from denial of rehearing *en banc*, that the State's suggestion that the fundamental educational improvements accomplished through the *Milliken II* programs in this case be terminated immediately was unrealistic and called into question the State's factually unsupported claim that it had demonstrated its good faith commitment to the courts' decrees.

The State filed this second Petition on its partial unitary status claim before this Court granted *certiorari* in No. 93-1823. The State asserts in this second Petition that the Eighth Circuit's discussion of the circumstances the State should consider in attempting to establish its good faith in subsequent proceedings before the district court creates a distinct issue from those raised in its first Petition. The decisions below, however, raise no such issue; they reach the same unremarkable conclusions about the State's repeated failure to meet its burden of proof, relying upon the State's same sparse record and the same settled legal principles.

REASONS FOR DENYING THE WRIT

Petitioners' stated issue is not raised by this case at all. The State claims that the decisions below require a perpetual remedy as a prerequisite to a declaration of partial unitary status, when in fact the lower courts said no such thing. Rather, the courts below twice carefully applied the standards recently articulated by this Court in *Freeman*, 112 S. Ct. 1430, to the same factual record. Indeed, the challenged decision here, like that already under review in No. 93-1823, held only that the State had failed to meet its burden of proving that the vestiges of segregation addressed by the *Milliken II* relief in this case have "been eliminated to the extent practicable" and that the State "has demonstrated a good faith commitment to the whole of the Court's decree." App. 5-6 (*quoting Freeman*, 112 S. Ct. at 1446). The court explicitly relied on its decision in *Jenkins IX*, 11 F.3d 755; 93 App. 1, noting that the "record now before us relevant to the *Freeman* issue has been supplemented to only a minor degree since" then. App. 6. Therefore, there is no reason for the Court to grant *certiorari* again to review the same issues on an "essentially identical" record. *Id.* Instead, the Court should deny review or simply hold this Petition pending its decision in No. 93-1823, which is already proceeding on an expedited schedule. Indeed, if the Court were to grant *certiorari* on this Petition, briefing and argument on the merits could not proceed on the schedule already ordered in No. 93-1823.

THE PETITION PRESENTS NO NOVEL LEGAL ISSUE OR SPLIT AMONG THE CIRCUITS, BUT INSTEAD INVOLVES FACT-SPECIFIC ISSUES GOVERNED BY SETTLED LEGAL PRINCIPLES THAT THE COURTS BELOW CAREFULLY FOLLOWED

A. The Lower Courts Properly Applied This Court's Standards for the Determination of Partial Unitary Status and Did Not, as the Petitioners Claim, Effectively Impose Permanent Injunctive Relief

No party or court in this case disagrees with the fundamental proposition that federal judicial supervision of public school systems is " 'intended as a temporary measure.' " Pet. 10 (quoting *Board of Education v. Dowell*, 498 U.S. 237, 248 (1991)). The Petitioners misread the decisions below as conflicting with this well-settled principle by effectively mandating perpetual injunctive relief as a prerequisite to a declaration of unitary status. Neither the Eighth Circuit's nor the district court's opinion requires any such thing.[7] Rather, the Petitioners twist the Court of Appeals' language and distort its context in a now redundant attempt to secure this Court's review. The Eighth Circuit's language, its actual context, and the entire record on appeal make clear that the issue purportedly presented by this Petition is a chimera. The State's horrific fantasy of a never-ending remedy cannot alter the inescapable reality that any issues actually presented here are the same as those presented in No. 93-1823.

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[7] Likewise, there is no question but that the consequence of a declaration of unitary status is "the relinquishment of jurisdiction by the courts and the return of autonomy and responsibility" to State and local officials. Pet. 16. Having rejected the State's contention that the KCMSD is partially unitary, the lower courts have not yet had occasion to address the consequences of such a finding. Therefore, Petitioner's recitation of cases supporting this accepted principle is irrelevant. Pet. 16-20.

This Court in *Freeman* authorized district courts to exercise their discretion to withdraw supervision from general areas of school district operations only where: (1) "the vestiges of past discrimination [in that area] have been eliminated to the extent practicable," 112 S. Ct. at 1446 (quoting *Dowell*, 111 S. Ct. at 638); (2) "there has been full and satisfactory compliance with the decree in those aspects of the system where supervision is to be withdrawn," *id.*; (3) "retention of judicial control is [not] necessary or practicable to achieve compliance with the decree in other facets of the system," *id.*; and (4) the defendant "has demonstrated, to the public and to the parents and students of the once disfavored race, its good faith commitment to the whole of the court's decree and to those provisions of the law and the constitution that were the predicate for judicial intervention in the first instance." *Id.* The Eighth Circuit's recent decisions both recognize each of these standards and correctly hold that the State failed to carry its burden of proof on three of these four issues. App. 6; 93 App. 19.

The State, however, makes the extraordinary claim that the Eighth Circuit in its second decision *sua sponte* "created a perpetual remedy," although no party asked the district court or the Eighth Circuit to extend the injunctive relief at issue here beyond the current school year. Pet. 10. In the single passage upon which the Petitioners rely exclusively, the panel opinion actually quotes the dissent from the denial of rehearing *en banc*, upon which the State itself relied heavily in its Petition in No. 93-1823. The dissenters wrote that the defendants must ensure that " 'equal opportunity to receive a quality education' should be '*permanently* available to each student in the KCMSD.' " App. 9 (quoting *Jenkins*, 19 F.3d at 404 (emphasis added); 93 App. 67). This dicta, far from mandating perpetual injunctive relief, reiterates the central Fourteenth Amendment holding of *Brown v. Board of Education*, 347 U.S. 483 (1954), that students may not be deprived of equal educational opportunities on the basis of their race:

> Today, education is perhaps the most important function of state and local governments . . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms. [*Id.* at 493.]

To say that such equal educational opportunities should be "permanently available" does not mandate either a perpetual judicial remedy or never-ending judicial supervision, but compliance with the essential dictates of the Fourteenth Amendment.

The contexts in which this language appeared originally in the State's first appeal and subsequently in the decision under review further demonstrate the misguided nature of the State's claim that the Eighth Circuit has effectively mandated a perpetual remedy. The supposed "perpetual remedy" language was first used by the dissenters from the denial of rehearing *en banc* in the State's first partial unitary status appeal to explain why even the dissenters would only have remanded the State's request. One of the issues, on which even the dissenters conceded the State had not met its burden of proof, was whether "the State and the KCMSD have an affirmative commitment to continue to provide a nondiscriminatory, quality educational program in Kansas City," *Jenkins*, 19 F.3d at 404; 93 App. 68, the "good faith" prong of the analysis required by this Court in *Freeman* and *Dowell*.

The dissenters' concern, in light of the history of this case, is obvious and well-founded. The State of Missouri not only segregated black students in Kansas City's public schools for a century but then, rather than contributing to an effective remedy after *Brown*, created and perpetuated for three decades a cycle whereby these predominantly black schools were deprived of the resources necessary for adequate operation to the point where student achievement districtwide was reduced and school buildings literally rotted. *See supra* 3. Subsequently, the State for nine year has consistently opposed virtually every reme-

dial effort proposed by the plaintiffs or the KCMSD, while repeatedly refusing to offer the courts any meaningful alternatives. *See, e.g.*, 93 App. 123 ("the State has *never* offered the Court a viable, even tenable alternative and has been extremely antagonistic in its approach to effecting the desegregation of the KCMSD") (emphasis in original); November 12, 1986 at 7 ("during the course of this lawsuit the Court has not been informed of one affirmative act voluntarily taken by the Executive Department of the State of Missouri or the Missouri General Assembly to aid a school district that is involved in a desegration program"). In this context, the question of whether the State planned to "take its money and exit, stage left" and return to its earlier practices was so serious as to give pause to all eleven judges of the Eighth Circuit, including those judges who believed the panel had erred in affirming the district court's decision extending the *Milliken II* relief for the 1992-93 school year without requiring the lower court to hear additional evidence.

When the State appealed the district court's order extending much of this relief for 1993-94 and 1994-95, the Eighth Circuit again rejected the State's appeal for the same reasons it had before. App. 6 ("*Jenkins IX* governs our decision in this case"). The court noted that the State had not supplemented the record in any significant way and specifically reiterated several of the bases for its holding in *Jenkins IX* that the State had not met its burden of proving that KCMSD was partially unitary with respect to educational quality. *Id.* The panel also addressed the concerns raised by the dissenters from the recent denial of rehearing *en banc* in the State's first partial unitary status appeal. The panel explained more explicitly why all eleven judges of the Eighth Circuit had concerns about the State's proposal that these educational programs simply be terminated immediately. App. 8. The panel explained that in the context of this case, in which the State's violations have contributed to the District's inadequate funding, this proposal called into ques-

tion the State's factually unsupported argument "that it has demonstrated its good faith commitment to all of the court's decrees." App. 11. The court below then reminded the State that the question of good faith is a factual question for the district court. The court concluded that the "State has not attempted to make a factual showing on" the issue of its good faith "for determination by the district court." *Id.* This discussion of the "good faith" prong of the *Dowell* and *Freeman* inquiries by no means "creates a perpetual remedy."

The issue before the Eighth Circuit concerned only the 1993-94 and 1994-95 school years. No party had requested relief beyond that time period and the district court had not considered the question. No evidence addressed the question of how the *Milliken II* components would or could be maintained were the KCMSD declared unitary in the area of educational quality.[8] There thus was no basis for the Eighth Circuit to rule on the status of the parties' remedial obligations after 1994-95, and it did not. Instead, having found that the State again had not even tried to prove a history of good faith commitment to the whole of the court's decree, the court suggested in dicta that to demonstrate good faith the State ought to at least consider how the defendants could assure the plaintiff school children of equal educational opportunities regardless of race when court supervision ends.

The legitimate inquiry into that issue, which is necessary to a meaningful determination of "good faith" in this case, is completely consistent with the decisions of this

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[8] Judge Clark has ordered the parties to file financial reports addressing the question of how KCMSD could fund continuation of these programs after withdrawal of court-ordered state funding—an order totally inconsistent with any intention to require the State to fund a "perpetual remedy." App. 9; 93 App. 140-42. A hearing to consider this and other longer term remedial issues is expected within the next year.

Court [9] and of the other circuit courts. The Petitioners, attempting to portray the decision below as creating a split among the circuits, cite decisions from other circuits that are in fact consistent with the decisions below in their legal analysis, but that reflect varying results on the particular facts presented in each.[10] For example, Petitioners cite the decisions on remand from this Court in *Dowell v. Board of Education of Oklahoma City*. Pet. 18-19. The Tenth Circuit in *Dowell*, however, employs precisely the type of good faith analysis that the Eighth Circuit found that the State of Missouri had failed to address here. There the Tenth Circuit analyzed whether the defendant seeking unitary status had (1) operated in "good faith compliance for a reasonable period of time" and (2) was unlikely to "return to its former ways." *Dowell v. Board of Education of Oklahoma City*, 8 F.3d 1501, 1512 (10th Cir. 1993). In *Brown v. Board of*

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[9] The Eighth Circuit's decision "does not contravene decisions of this Court by elevating quality education" to the level of a fundamental constitutional right, as Petitioners suggest. Pet. 20. Instead, the court below reaffirmed that the Fourteenth Amendment may require improved educational quality "to erase the effects of prior school segregation," Pet. 22-23 (quoting *Liddell v. Caldwell*, 546 F.2d 768, 773 n.10 (8th Cir. 1986)), consistent with the Court's decisions in *Milliken II*, 433 U.S. 267 (1977), and *Freeman v. Pitts*, 112 S. Ct. 1430, 1446 (1992).

[10] The two Eleventh Circuit decisions cited by Petitioners do not demonstrate a split in the Circuits but rather the necessarily fact-bound nature of the unitary status inquiry. In two cases "decided eleven days apart," Pet. 19, and employing the same legal standards applied by the Eighth Circuit in the decision below, the Eleventh Circuit reached different results because of differing facts. In *Lee v. Etowah County Bd. of Educ.*, 963 F.2d 1416 (11th Cir. 1992) the court reversed a unitariness holding and remanded for a full evidentiary hearing as to unitary status of the defendant school district. On the other hand, in *Lee v. Talladega County Bd. of Educ.*, 963 F.2d 1426 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1257 (1993), the court refused to reopen a desegregation case where the defendant school district had been found, after a hearing meeting the *Freeman* and *Dowell* standards, to be unitary.

Education of Oklahoma, 978 F.2d 585 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 2994 (1993), the Tenth Circuit also elaborated the type of proof relevant to *Freeman's* good faith inquiry:

> Mere protestations of an intention to comply with the Constitution in the future will not suffice. Instead, specific policies, decisions, and courses of action that extend into the future must be examined to assess the school system's good faith. [*Brown*, 978 F.2d at 592.]

Likewise, in *Freeman* itself, despite favorable findings by the district court about the defendants' dedication to the remedial efforts in Dekalb County, this Court suggested that "further proceedings" would be appropriate to determine whether there is "an affirmative commitment to comply in good faith with the entirety of a desegregation plan." 112 S. Ct. at 1450.

The Eighth Circuit's decision here was relatively easy, for the State did not even offer "protestations of an intent to comply in the future." The Eighth Circuit observed both that the State had offered *no* evidence of its good faith (beyond the fact of compliance itself) and that the State's proposal to terminate all support for the *Milliken II* relief in the KCMSD raised a question whether the State had abandoned its former unconstitutional ways that "must first be developed by the district court." App. 11. The State has consistently opposed and continues to oppose, often on contradictory grounds, virtually every aspect of the remedy in this case. The only component of the remedy for which the State is principally responsible, voluntary interdistrict transfers, has never been implemented on a meaningful scale. 93 App. 20 n.10. On appeal, the State argued for the second time that, with the task of desegregation in student enrollment admittedly incomplete and without regard to whether educational vestiges remain unremedied, its responsibility to help to fund teachers, librarians and counselors, and programs

like full-day kindergarten and summer school, should end because, after a century of segregation and decades of neglect, it has begrudgingly complied with court orders for several years. In this context, it is not unusual, and certainly not inappropriate, for the Eighth Circuit to question the State's long term commitment to equal educational opportunities for the plaintiff school children. More importantly, however, this discussion obviously does not create a perpetual remedy and does not raise any new issue not presented in No. 93-1823.

B. The State Failed to Move the District Court for a Declaration of Partial Unitary Status or Even to Attempt to Carry its Burden of Proof on Several Critical Issues, and the Rejection by Both Lower Courts of the State's Argument on Those Fact-Specific Grounds Raises No Issue Meriting This Court's Review That Is Not Also Presented on a Virtually Identical Record in No. 93-1823 in Which This Court Recently Granted Certiorari

As demonstrated above, the first issue raised by the State is a false one. What the State truly attacks here, as in No. 93-1823, are the lower courts' repeated findings that it did not carry its burden of proof with respect to the standards set forth in *Freeman*. But nothing in those findings presents any new issue meriting this Court's review.[11] It is not the Eighth Circuit that misunderstands "the entire concept of unitary status," as Petitioners sug-

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[11] Moreover, the State cannot show—indeed has not even argued—why this Court should abandon its rule against disturbing the findings concurred in by both courts below. This Court has repeatedly held that it will not disturb findings of fact concurred in by both a district court and court of appeals. *See, e.g., Tiffany Fine Arts, Inc.* v. *United States*, 469 U.S. 310, 317 n.5 (1985); *NCAA* v. *Bd. of Regents*, 468 U.S. 85, 98 n.15 (1987); *Washington Area Transit Auth.* v. *Johnson*, 467 U.S. 925, 928 n.5 (1984); *Rodgers* v. *Lodge*, 458 U.S. 613, 623 (1982). Here, the district court and court of appeals have concurred in *all* of the relevant factual findings on both the *Freeman* issues at least *twice*.

gest, but the State itself. The essence of "unitary status" is not "the cessation of the remedy and the withdrawal of federal court supervision," Pet. 10, but the elimination to the extent practicable of the vestiges of the State-mandated dual school system and the establishment of a school system that provides equal educational opportunities regardless of race. As this Court has made clear, only when the latter, the true essence of unitary status, has been achieved, is the former permissible.

This Court left no doubt that partial relinquishment of judicial control in a school desegregation case is only appropriate "where justified by the facts of the case." *Freeman*, 112 S. Ct. at 1445. The State, however, failed twice in the district court to move for a declaration of unitary status, to allege that this Court's standards for the partial relinquishment of judicial control were met, or even to try to carry its burden of proof with respect to those standards. Instead, the State argued below that the "establishment of the programs by compliance with the court order is all that is required." 93 App. 19. The State limited its evidence to the fact that it had complied with prior court orders by providing part of the funds necessary to enable the District to purchase educational resources such as books, teachers, librarians, and counselors and to offer educational programs such as summer school. The State also compared the resources provided in KCMSD to several neighboring school districts. However, the State presented no evidence that the programs were effective in remedying the harms that they were designed to address.

The State misses one of the fundamental tenets of school desegregation law reaffirmed by this Court in both *Freeman* and *Dowell*. Defendants in school desegregation cases have an affirmative duty to remedy their constitutional violations by eliminating the harms that they have caused:

> The District Court should address itself to whether the Board ha[s] complied in good faith with the de-

> segregation decree since it was entered, *and whether the vestiges of past discrimination ha[ve] been eliminated to the extent practicable.* [*Freeman*, 112 S. Ct. at 1446 (quoting *Dowell*, 111 S. Ct. at 638) (emphasis added).] [12]

The State, however, did not even allege, let alone attempt to prove, that the educational harms or racial isolation caused by State-mandated segregation in the KCMSD had been eliminated to the extent practicable.[13] The State's evidence in both the 1992 and 1993 *Milliken II* hearings did not mention the "systemwide *reduction* in student achievement," the "low achievement" among minority students, the "general attitude of inferiority among blacks," or the level of racial isolation in KCMSD.[14] *See supra*

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[12] *See Freeman*, 112 S. Ct. at 1443 ("duty . . . to take all steps necessary to eliminate the vestiges of the unconstitutional *de jure* system"), *id.* at 1445 ("end purpose must be to remedy the violation"); *Board of Education of Oklahoma City v. Dowell*, 498 U.S. at 249-50 ("District Court should address . . . whether the vestiges of past discrimination had been eliminated to the extent practicable").

[13] The State made no such showing; its evidence addressed only the level of certain basic resources but did not address the "quality" or effects of the programs offered in any other way. Indeed, while the State has fully accredited *all* of the other ten school districts in the Kansas City area that it has evaluated—based on the level of educational resources they provide as well as other measures of the quality of their programs—it has only provisionally accredited KCMSD, the State itself finding significant deficiencies in educational quality measures. Testimony of Arthur Rainwater, July 7, 1993 at 23-25. KCMSD's evidence also clearly showed that, while the District has improved its educational quality and desegregation levels, more progress is necessary to put the victims of segregation in the position they would have been but for the constitutional violation. 93 App. 112-13, 131. The District's evidence included, among other things, statistics on student enrollment and historical data on student performance according to a number of indicators.

[14] Unquestionably, the *Milliken II* programs in this case are designed to address the legacy of segregation in all of these areas. *See, e.g., Jenkins*, 639 F. Supp. at 24, 27, 29, 31 (educational pro-

notes 3 and 6. Therefore, the State twice failed to make a record that would allow this Court a meaningful review of whether the KCMSD is partially unitary. In the decision below, the Eighth Circuit held for the second time in a year that "the evidence fell short of establishing that the vestiges of past discrimination had been eliminated to the extent practicable" and that "the State did not try to prove a history of good faith commitment to the whole of the court's decree." App. 6. Even the dissenters from the denial of rehearing *en banc* of the State's first appeal noted that it is "still an open question on the record before us today." *Jenkins*, 19 F.3d at 404; 93 App. 58.[15]

This Court granted *certiorari* on the State's first Petition. The Court has already set an expedited briefing schedule and will have a full opportunity to review the record. Nothing in the record below on this Petition, which is "essentially identical" to that in No. 93-1823, App. 6, or in the decisions below, which rest on the same failures of proof by the State, *id.*, justifies granting another writ or disturbing the schedule for No. 93-1823. Petitioner's brief on the merits in No. 93-1823 is due on November 8, which is only two weeks from now.

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grams ordered in part to remedy educational harms). *See also id.* at 27, 29, 31, and 35 (educational programs ordered will help in "attracting and maintaining non-minority student enrollment").

[15] The State also implicitly challenges the lower courts' legal determination that it is necessary for the district court to retain jurisdiction over the educational programs that the State claims are unitary in order to ensure compliance with the court's decree in other areas that the State concedes are not. *Jenkins*, 11 F.3d at 765; 93 App. 19. This issue too is raised even more directly in No. 93-1823 and does not merit the granting of a second writ. As this Court has recognized, "[t]wo or more *Green* factors may be intertwined or synergistic in their relation, so that a constitutional violation in one area cannot be eliminated unless the judicial remedy addresses other matters as well." *Freeman*, 112 S. Ct. at 1449 (citations omitted). The voluntary remedy here, which requires eliminating the educational vestiges of the violation in order to attract a desegregated student enrollment, is the quintessential example of such synergism.

This case could not be consolidated with No. 93-1823 without disrupting the expedited schedule set in the Court's September 26, 1994 Order in No. 93-1823. Because the issue the State claims is presented in this Petition in fact is not presented by the holding of the courts below and because the State's limited record below adds nothing significant concerning its *Freeman* argument, separate consideration of this Petition by the Court would be wasteful, since the only issues it potentially does raise are also presented in No. 93-1823. The proceedings already in progress in No. 93-1823 will ensure that the lower courts' analysis of these questions will continue to follow the appropriate legal standards.

CONCLUSION

For the foregoing reasons the Petition should be denied or, at most, held pending the disposition of the proceedings on the merits in No. 93-1823.

Respectfully submitted,

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APPENDIX

APPENDIX

[Filed June 30, 1993]

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 77-0420-CV-W-4

KALIMA JENKINS, *et al.*,
Plaintiffs,

v.

STATE OF MISSOURI, *et al.*,
Defendants.

DECLARATION OF TERRANCE A. STEWART

Comes now the Declarant, Dr. Terrance A. Stewart, pursuant to 28 U.S.C. § 1746, and states as follows:

1. I am currently the Assistant Commissioner for Education for Administration with the Missouri Department of Elementary and Secondary Education.

2. I testified before the Court most recently on May 28, 1992. My resume was presented to the Court as State's Exhibit 10 at that time and remains accurate.

3. Currently, I continue to be involved in the monitoring and implementation of the KCMSD remedial components. I review correspondence sent to the District relating to the school desegregation case, review pleadings filed in this case and receive updates and reports on an almost daily basis from the Director of the Desegregation Services section.

4. I have reviewed the Joint Motion of KCMSD and Plaintiffs for Approval of Next Two Years of Milliken II

Desegregation Plan. I submit this declaration in support of the State's response to that motion. I will discuss in the following paragraphs an update of the testimony I gave with regard to the desegregation programs on May 28, 1992.

5. AAA—The KCMSD continues to maintain AAA status, such that the KCMSD has maintained AAA status continuously to the present time since that classification was first awarded to the District in 1987-88. The District has, in fact, exceeded AAA requirements in several areas. Attachment 1 to this declaration demonstrates that all of the suburban school districts have some deficiencies in the library resources they have, while the KCMSD has no deficiencies. The KCMSD also continues to exceed AAA requirements for librarians, and is ahead of most of the surrounding suburban districts in librarians per pupil. See Attachment 1. With regard to counselors per pupil, the KCMSD is ahead of AAA requirements and ahead of most of the suburban districts in most categories of counselors per pupil. See Attachment 2 to this declaration. With regard to art, music and physical education services, the KCMSD meets or exceeds AAA requirements and is ahead of almost all of the suburban districts in art, music and physical education teachers per pupil. See Attachment 3 to this declaration.

6. I continue to believe that the attachment and maintenance of AAA status since the 1987-88 school year has enhanced the level of quality of the educational opportunity available to all students in the KCMSD.

7. Reduced Class Size—I testified at the hearing last year that the Reduced Class Size orders of the Court were fully met in the 1988-89 school year and have been maintained since that time. I have reached the following conclusions regarding class size issues:

A. As pointed out in Attachment 4 to this declaration, in all of the suburban districts used as

comparisons, there are numerous classes that have more than 22 students at the K-3 level.

B. All of the suburban districts used as comparisons have classes with 28 or more students at the grade 4-6 level. See Attachment 5 to this declaration.

C. All of the suburban districts have teachers who have class loads greater than 125 per teacher at the high school level. See Attachment 6 to this declaration. The average teacher load in these districts for grades 9-12 is higher than the KCMSD's average teacher load of 78.83.

8. It continues to be my opinion, that the attainment and maintenance of the Reduced Class Size goals of the remedy since the 1988-89 school year has enhanced the level of quality of educational opportunities available to all students in the KCMSD. By establishing the reduced class sizes, the opportunity for desegregative educational opportunities has been provided and maintained since the class size goals were met.

9. Full-Day Kindergarten—Once again, all of the suburban comparison districts offer only half-day kindergarten. The KCMSD services 3,409 kindergarten students. In my opinion, provision of the full-day kindergarten program to KCMSD students since 1985-86 has enhanced the quality of educational opportunity available in the District and has provided desegregative opportunities to the KCMSD.

10. Extended Day—In my opinion, the continued existence of the Extended Day program beginning in the 1985-86 school year (as the Before and After School Tutoring Program) has enhanced the level of quality of educational opportunity for students in the Kansas City, Missouri School District. The existence of that program on a continuing basis has provided the opportunity for retention and attraction of non-minority students.

11. Summer School—Attachment 7 to this declaration shows summer school enrollment in the KCMSD and 11 suburban districts near the KCMSD. The exhibit demonstrates that the KCMSD once again had the highest summer school participation rate of these districts for the 1991-92 school year. In my opinion, the operation of the summer school program since 1985 has provided an opportunity for students in the KCMSD to obtain an enhanced level of quality of education, and has provided desegregative opportunities to the KCMSD. The opportunity for remediation has also been provided.

12. Early Childhood—In my opinion, the continued availability of the Early Childhood program since 1986-87 has enhanced the quality of educational opportunity in the KCMSD.

13. Effective Schools—In my opinion, as I testified last year, the availability of the Effective Schools program has enhanced the quality of educational opportunity in the KCMSD over the quality that was available before the Effective Schools program started in the 1985-86 school year. The availability of this program has also enhanced the opportunity of the KCMSD to increase the amount of desegregation within the school district. There is no Effective Schools program as such in any of the surrounding school districts.

14. I also continue to believe that the year IX-X programs should be considered to be fully implemented. The fact the KCMSD has not met a goal of 60% minority/40% non-minority and has not met national norms for achievement testings does not alter the fact that the programs cited here have been fully implemented. Tr. 5/28/92 at 498-99.

I swear the foregoing is true and correct to the best of my knowledge and belief.

/s/ Terry Stewart

Executed an June 28, 1993

No. 94-434

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In The
SUPREME COURT OF THE UNITED STATES
October Term, 1994

STATE OF MISSOURI, et al.,
Petitioners,

vs.

KALIMA JENKINS, et al.,
Respondents.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Eighth Circuit

PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

It is a fundamental principle of desegregation law that the remedies ordered by the courts are temporary programs established to eliminate prior segregation and to eradicate the vestiges of that segregation to the extent practical. *Board of Education v. Dowell*, 498 U.S. 237 (1991); *Freeman v. Pitts*, 112 S. Ct. 1430 (1992). The imposition by the Eighth Circuit Court of Appeals of a requirement for permanent remedial funding as a prerequisite for a finding of unitary status is in direct conflict with this well-established rule.

The respondents pay lip service to that rule, but argue the court of appeals decision does not require such a permanent remedy. However, that argument contradicts the plain language of the court's decision. Resolution of this issue is crucial, not only in this case, where the court-ordered remedial quality education programs alone now cost approximately $54 million per year, but also in other desegregation cases across the United States that are headed into the final stages of their remedy phase.

I. The Decisions of the Courts Below Require the Creation of a Permanent Remedy.

A. The Decision of the Court of Appeals Requires Permanent Funding of Specific Programs as a Prerequisite for a Finding of Unitary Status, Thus Interfering with the Ability of the KCMSD to Adapt to Future Needs and the State to Allocate Resources to Address Critical Demands.

Contrary to the respondents' contention, the court of appeals explicitly endorsed the requirement that the defendants in this suit, the State of Missouri and the School District of Kansas City, Missouri (KCMSD), ensure the permanence of the remedial programs. The court expressed its fear that even if the State only gradually withdrew its extraordinary support for the KCMSD, there would be "a serious possibility of substantial elimination or disruption of the quality education programs." Pet. App. A-9. The court then stated that "[t]he KCMSD must administer and operate these programs." *Id.* (emphasis added). The court spoke of the State's obligation as well, which it defined as "the obligation to fund its share of the cost of these programs." *Id.* It is difficult to understand how the court could have

made its position more clear: unless and until there is a mechanism in place assuring the permanent implementation of "these [quality education] programs," there can be no partial or full unitary status finding.[1]

No one disputes that the KCMSD must return to a unitary system in order for this litigation to come to an end. However, mandating permanent funding for particular remedial programs, or mandating that a particular level of quality of education must be maintained, flatly exceeds any standard set by this Court or by the Equal Protection Clause of the Constitution. The court of appeals has thus confused the specific quality education programs in place with the concept of equal educational opportunity guaranteed by the Constitution, and so has elevated these temporary, remedial programs to the level of a constitutional right.

The respondents' own actions in the courts below belie their attempt to claim here that they really believe in the temporary nature of the remedy. In 1992, all of the respondents supported an effort to obtain a court order requiring the State to extend the entire magnet plan, along with its State funding, until sometime in the 21st century. *Joint Motion of KCMSD and Plaintiffs for Approval of Long-Range Magnet Renewal Plan*, (filed Sept. 1, 1992); *Transcript of January 25, 1993, Opening Statement of AFT counsel*, at 33-34. More recently, they indicated they would seek what on its face appears to be an extension of the remedy for a less-defined, but clearly lengthy multi-year

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[1] In the decision at issue, the Eighth Circuit affirmed the trial court's refusal to grant unitary status. But contrary to the assertions of the respondents, the issue here is not whether the State's factual evidence was sufficient; it is whether the lower courts could properly require permanent funding of the quality education programs.

period. *KCMSD First Report to the Court on Status of Magnet, Capital and Financial Planning*, (filed Sept. 14, 1994). Further, their determination has not faltered; within days of submitting their multi-year request, they submitted a plan to extend the magnet program (again, with State funding) until at least 2004. *See Long Range Magnet Renewal Plan* (submitted Sept. 28, 1994).

Even in response to the district court's order of April 16, 1993, calling for the submission of a long-range financing plan, KCMSD called for indefinite continuation of the current desegregation programs or their equivalents and the accompanying extraordinary funding. *See KCMSD Financial Plan Filed in Response to April 16, 1993 Order*, (filed July 30, 1993). There, the KCMSD stated:

> One of the major assumptions of the District's Financial Plan has been that the basic current annual operating and desegregation expenses of the District will continue into the coming decade at approximately their current levels. . . . Accordingly, KCMSD's Plan necessarily has been constructed, on the expenditure side, on the assumption of basic continuity in current expenditure levels.

Id. at 3-4 (footnote omitted and emphasis added). Clearly, the KCMSD has no plan for termination of any of the quality education components.

In mandating continual funding, the court of appeals has not limited itself even to the multi-year extensions the respondents have repeatedly sought. The court of appeal's position is clearly contrary to the mandate that authority for

managing the school district be returned to the local level -- even if in the eyes of the district's own management, the benefits of extraordinary state funding outweigh the disadvantages of having a court, rather than a community and the educational staff it selects, act as the final arbiter of educational decision-making.

B. The Decisions of the District Court, Although Superficially Suggesting that an End to Extraordinary Funding is Possible, Actually Endorse the Permanent Funding Requirement Adopted by the Court of Appeals.

While the court of appeals endorsed the permanent implementation of "the quality education programs" now in place, the district court has taken a slightly different tack. The respondents point to that approach, and attempt to draw from it some contradiction of the court of appeal's position. That effort is unavailing.

The district court order on which the respondents rely was accurately described by the court of appeals:

> [T]he district court has called for the parties to submit plans for financing "the magnet schools and the entire school district at a level commensurate with the current funding or at least at a level where the same quality of both facilities and instruction can be maintained," assuming withdrawal of court-ordered fundings within three, five, seven and ten years, alternatively.

Pet. App. A-9. At first blush, this approach seems more flexible. It suggests a vision that "court-ordered funding" will eventually end. In reality, it is merely another method for articulating the same vision embodied in the court of appeals decision; *i.e.*, the district court may be willing to bring court-ordered desegregation funding to an end, but only when there is a permanent source of sufficient funds to permit the "entire" KCMSD to maintain its current spending levels. *Id.*

It is apparent that no other school district in the State of Missouri (with the exception of the St. Louis School District, which is also being funded under a desegregation decree) receives State funds at a level even remotely approaching those which the KCMSD now receives. The KCMSD, with just 4.28 percent of the state's student population in the 1993-94 school year, received 8.25 percent of state funds, excluding court-ordered desegregation funds -- nearly twice its "per capita" share. In the 1994-95 school year, with new funding formulas in place, the figure has grown to 8.46 percent. Thus, even without the court-ordered state aid, the KCMSD is receiving and will continue to receive state funding far in excess of what is provided to most other Missouri schools. The district court's decision, however, clearly states that such funding is not enough.[2]

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[2]In the district court's view, the KCMSD need never live within a budget even remotely similar to that of other Missouri school districts. Instead, the court wants to preserve a situation in which the KCMSD does not receive just 8.46 percent of the entire state budget allocated to local school support, but in which the KCMSD can continue to have available nearly 23 percent of the state elementary and secondary education budget. In the present school year this amounts to $77 million in basic state funding and $212 million appropriated for desegregation funding.

The court articulates that rule by speaking out of two sides of its mouth: on one side by asking for a plan to phase out court-ordered funding, but on the other side by demanding a plan that will permit the KCMSD to maintain programs and facilities that do not just match, but exceed those available in all other Missouri school districts. That can be done only by requiring the State to adjust its funding formulas to give the KCMSD more than five times its regular per-pupil share of the state education budget. From the point of view of the State, which merely funds and does not control or operate the KCMSD programs, that change is the practical equivalent of the court of appeal's mandate that there be permanent implementation of the KCMSD remedial programs themselves. The plan implicitly endorsed by the court of appeals would permanently continue the dilemma faced by the State today: that hundreds of millions of dollars are spent on extraordinary funding for a single school district, at a time when the number of minority and disadvantaged students in other districts is increasing, and when scientific data are showing that the causes of poor academic performance are not rooted in the educational system itself, but in the poverty, crime, joblessness, and other problems of our nation's urban areas. The district court's plan would permanently preclude the State of Missouri from making the policy determination that funds now spent on elaborate quality education and magnet school programs should instead be used to address those needs.

II. The Requirement that a Permanent Remedy be Implemented is Contrary to This Court's Entire Jurisprudence on School Desegregation Issues, as well as with the Decisions of Other Courts of Appeals.

The Eighth Circuit's requirement of permanent funding for programs is in direct contradiction to this Court's holdings in *Freeman* and *Dowell*:

> In *Dowell*, we emphasized that federal judicial supervision of local school systems was intended as a "temporary measure". 498 U.S. at 247, 111 S. Ct. at 636. Although this temporary measure has lasted decades, the ultimate objective has not changed - to return school districts to the control of local authorities.

Freeman, 112 S. Ct. at 1445. In *Dowell*, this Court rejected the "Draconian result" of "judicial tutelage for the indefinite future," *Dowell*, 498 U.S. at 249, and instead held:

> Dissolving a desegregation decree after the local authorities have operated in compliance with it for a reasonable period of time properly recognizes that "necessary concern for the important values of local control of public school systems dictates that a federal court's regulatory control of such systems not extend beyond the time required to remedy the effects of past intentional discrimination."

Id. at 248 (citations omitted).[3] Those decisions make it clear that such a restoration of control upon attainment of unitary status is mandatory:

> [R]eturning schools to the control of local authorities at the earliest practicable date is essential to restore their true accountability in our governmental system.

Freeman, 112 S. Ct. at 1445; *Dowell*, 498 U.S. at 247-49.

The court of appeals decision also conflicts with other federal appellate decisions on this issue. Respondents do not deny that every other circuit court that has considered the issue (other than the Tenth Circuit which this Court reversed in *Dowell*), has held that unitary status means a return of autonomy and responsibility for the subject school district to local authorities.

Respondents are left to argue the undisputed principle that unitary determinations are ultimately fact intensive. What respondents miss, however, is that the issue presented by the petition is a straight forward legal question: whether a federal court may order a perpetual remedy in a desegregation case by requiring continuation of remedial programs as a precondition to unitary status. It is on this issue that the Eighth Circuit has diverged from all courts of appeal that have ruled on this issue.

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[3]Of course, permanent funding of quality education programs would mean not only judicial tutelage for the indefinite future, but for all time.

CONCLUSION

The Eighth Circuit departed from settled precedents of this Court in requiring perpetual funding of quality education programs implemented as part of a desegregation remedy. Its opinion also is in conflict with numerous decisions among the circuits. This Court should therefore grant the State's petition for writ of certiorari.

Respectfully submitted,

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